(18,603.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 83.

W. H. SPENCER, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JAMES V. BENNETT AND SAMUEL W. ROTHROCK, PARTNERS AS BENNETT AND ROTHROCK, PLAINTIFF IN ERROR,

vs.

DUPLAN SILK COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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1 April Sessions, 1901.

Trespass.

R. E. Wright
T. M. B. Hicks

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of New York. } 6.

Frank Jacobs
Wm. J. Turner

1901, March 19.—Exemplification of record from the court of common pleas, Lehigh county, Penna., filed.
1901, March 19.—Wm. J. Turner, Esq., appears for defendant.
1901, April 23.—Plea filed.
1901, May 6.—R. E. Wright, Esq., and T. M. B. Hicks, Esq., appear for plaintiff.
1901, May 7.—Replication filed.
1901, Nov. 11.—And now to wit a jury being called come to wit (see Minutes).
And the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at twelve thousand one hundred and eighty three 00-100 dollars.
Plaintiff's bill of costs filed.
Motion for judgment *non obstante veredicto* filed.
1902, January 15.—Opinion, McPherson, J., refusing defendant's motion for judgment *non obstante veredicto* filed.
1902, January 18.—Præcipe for judgment filed. Judgment accordingly.
1902, January 24.—Bill of exceptions sealed and filed.
1902, January 24.—Assignments of error filed.
Petition for writ of error allowed and filed.
Writ of error exit and copy thereof lodged in clerk's office for adverse party.
Citation allowed and issued.
Bond sur writ of error approved and filed.
1902, January 27.—Citation returned service accepted.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you between W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, pl'ff, and Duplan Silk Company, def't, a manifest error hath happened, to the great damage of the said Duplan Silk Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the third circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 24th day of January, in the year of our Lord one thousand nine hundred and two.

SAMUEL BELL,

[SEAL.] *Clerk of the Circuit Court of the United States.*

Allowed by—
THE COURT.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the third circuit, to
3 be holden at the city of Philadelphia within thirty days, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, eastern district of Pennsylvania, wherein Duplan Silk Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John B. McPherson, judge, holding circuit court of the United States this 24th day of January, in the year of our Lord one thousand nine hundred and two.

JOHN B. McPHERSON, *J.*

Service accepted.
T. M. B. HICKS,
Att'ys for Def't in —.

Exemplifications.

STATE OF PENNSYLVANIA, } ss:
Lehigh County, }

[Seal.] Among the records and proceedings of the court of common pleas for the county of Lehigh, State of Pennsylvania, the following may be found as matter of file and of record, at No. 42, November term, 1900, to wit:

Continuance.

Docket Entries.

November Term, 1900.

E. Wright

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of New York. } 42.

-nk Jacobs

Summons in trespass. Returnable to next term. Exit Oct. 18, 1900.

Served on E. J. Lipps, att'y and ag't for def't Oct. 29, 1900.

Oct. 18, 1900.—Statement of plaintiff's demand filed.

And now, November 13, 1900, plaintiff, by his attorney, enters rule on defendant to plead with ten days of judgment. Nov.
4 13, 1900, service accepted. Nov. 19, 1900, petition for removal of case to circuit court filed. Nov. 19, 1900, bond of Duplan Silk Company as principal and Wm. Jay Turner as surety in the sum of five hundred dollars, approved by the court, filed. Now, Nov. 19, 1900, upon petition of defendant it is ordered that a rule be granted on the plaintiff to show cause why the record of the above stated case shall not be removed to the circuit court of the United States for the eastern district of Pennsylvania, and the bond of the said defendant in the sum of five hundred dollars ($500) with William J. Turner, as surety, be approved. And that all proceed-

ings in the said case in the court of common pleas of Lehigh county be stayed in the meantime. Rule returnable 3d Monday of December next. Nov. 22, 1900, service accepted. Now, December 19, 1900, a rule having been granted on November 19, 1900, on the plaintiff in the above case to show cause why the record of said case should not be removed to the circuit court of the United States for the eastern district of Pennsylvania and the bond — above named defendant in the sum of five hundred dollars with William J. Turner as surety be approved, and said rule having been served on Robert E. Wright, counsel of record for said plaintiff, returnable the 3d Monday of December, 1900, upon due consideration it is ordered that said rule be made absolute, and that all proceedings in the above-stated case of the said court of common pleas of Lehigh county be stayed. That the record of the said case be removed to the United — circuit court for the eastern district of Pennsylvania, and that the bond of the said defendant in the sum of five hundred dollars with William J. Turner as surety conditioned that he will enter a copy of said record in said case in the said circuit court of the United States on the first day of its next session, and that it will well and truly pay all costs which may be awarded by said circuit court of said court shall hold that said suit was wrongfully or improperly *be* removed thereto, and shall cause to be done *and* such other proper acts as by the act of Congress approved March 3, 1875, and other acts of Congress are required to be done on the premises be approved.

In the Court of Common Pleas of Lehigh County, Nov. Term, 1900.

W. H. SPENCER, Trustee, etc.,
vs.
DUPLAN SILK COMPANY. } No. —.

5 To John F. Stine, prothonotary:

Issue summons in trespass as above stated returnable for the next term.

R. E. WRIGHT,
Attorney for Plaintiffs.

Endorsed: 42. Nov. T., 1900. W. H. Spencer, *et al.*, *vs.* Duplan Silk Co. Præcipe for summons filed Oct. 18, 1900.

LEHIGH COUNTY, *ss.*

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you that you summon Duplan Silk Company, a corporation organized and existing under the laws of the State of New York, so that it be and appear before our court of common

pleas, to be holden at the city of Allentown, in and for said county, on the second Monday of November next, then and there to answer W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, in an action of trespass in the court of common pleas aforesaid, at the suit of the said W. H. Spencer, trustee in bankruptcy, etc., *et al.*

And have you then and there this writ.

Witness the Honorable Edwin Albright, president of the said court, at the city of Allentown, the eighteenth day of October, in the year of our Lord one thousand nine hundred (1900).

JOHN F. STEIN,
Prothonotary,
Per WM. H. SNYDER, *Deputy.*

Endorsed: 42. Nov. term, 1900. W. H. Spencer, trustee, etc., *et al.*, *vs.* Duplan Silk Company. Summons. R. E. Wright, att'y. Sheriff W. B., $3.15.

In the Court of Common Pleas of Lehigh County, —— Term, 1900.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York.
} No. —.

6 *Statement of the Plaintiff's Demand.*

The plaintiff, W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, seeks in this action to recover from the defendant, Duplan Silk Company, a corporation organized and existing under the laws of the State of New York, the sum of twelve thousand (12,000) dollars damages, which is justly due and payable by the said defendant to the said plaintiff, upon the cause of action whereof the following is a statement:

That on the 13th day of January, A. D. 1900, under and by virtue of the provisions of the act of Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, were adjudged by the district court of the United States for the western district of Pennsylvania to be bankrupts. That on the 27th day of January, A. D. 1900, W. H. Spencer, the plaintiff, was duly appointed the trustee in bankruptcy of the estate of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock,

and duly qualified as such trustee, and has from that time continued to act and is now acting duly as such trustee.

That on or about the 15th day of January, A. D. 1900, the said Duplan Silk Company, the defendant, at Hazleton, in the State of Pennsylvania, wrongfully and illegally took and converted to its own use certain chattels of great value, to wit, of the value of twelve thousand (12.000) dollars, which were then and there the property of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, or of their bankrupt estate. That the said chattels were on the said 13th day of January, 1900, the property of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, and that by reason of the adjudging of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, to be bankrupts by the said district court of the United States for the western district of Pennsylvania on the said 13th day of January, 1900, the said chattels became the property of the bankrupt estate of the said bankrupts, and the title in and to the said chattels passed to and vested in W. H. Spencer, the plaintiff, the trustee in bankruptcy of the said estate of the said bankrupts, immediately upon his appointment and qualification as such trustee, as of the date of the adjudging of the said bankrupts to be bankrupt, to wit, as of the 13th day of January, 1900. That the following is a list and description of the said chattels, to wit:

7 *Yellow Pine Timber.*

103 pieces, 8 x 10 x 16	
18 pieces, 8 x 10 x 24	
23 pieces, 8 x 10 x 22	
34 pieces, 8 x 10 x 20	
13 pieces, 8 x 8 x 24	
23 pieces, 8 x 8 x 22	
19 pieces, 8 x 8 x 20	
123 pieces, 6 x 8 x 11	
78 pieces, 6 x 8 x 9	
15 pieces, 10 x 16 x 24	
14 pieces, 9 x 14 x 16	
8 pieces, 12 x 14 x 16	
11 pieces, 3 x 8 x 12	
80 pieces, 6 x 8 x 16	
19 pieces, 3 x 15 x 16	51,914 feet
5/4 yellow pine stepping	1,000 feet
4/4 yellow pine stepping	635 feet
Maple flooring	14,002 feet
3" spruce flooring	15,840 feet
Slip tongue	86,120 feet
13 turned posts, 13 ft. long	
24 turned posts, 14 ft. long	
12 turned posts, 12 ft. long	

24 turned posts, 17 ft. long
4 pieces, 4 x 8 x 24
545 pieces, 4 x 10 x 16
49 pieces, 4 x 10 x 18
9 pieces, 4 x 10 x 20
2 pieces, 4 x 10 x 22
5 pieces, 3 x 15 x 16
21 pieces, 3 x 12 x 18
12 pieces, 3 x 8 x 22
2 pieces, 3 x 8 x 12
1 piece, 4 x 6 x 16
7 pieces, 4 x 6 x 20
2 pieces, 4 x 6 x 24
2 pieces, 3 x 6 x 20
2 pieces, 6 x 6 x 14
9 pieces, 8 x 8 x 20
11 pieces, 8 x 8 x 21
3 pieces, 6 x 8 x 9
26 pieces, 6 x 8 x 11
21 pieces, 6 x 8 x 16
12 pieces, 8 x 10 x 20
1 piece, 8 x 10 x 18
8
158 pieces, 8 x 10 x 16
9 pieces, 8 x 10 x 22
2 pieces, 6 x 14 x 10
3 pieces, 6 x 14 x 16
2 pieces, 6 x 14 x 14..... 49,168 feet

Yellow Pine Timber.

9 pieces, 3 x 14 x 16
91 pieces, 3 x 4 x 14
2 pieces, 3 x 4 x 12
20 pieces, 10 x 16 x 16
17 pieces, 10 x 16 x 18
12 pieces, 10 x 16 x 20
11 pieces, 10 x 16 x 22
3 pieces, 10 x 16 x 24
8 pieces, 12 x 16 x 14 ..... 18,980 feet

Hemlock Timber and Plank.

Grooved two edges.

318 pieces, 2 x 12 x 14
350 pieces, 2 x 12 x 16
604 pieces, 2 x 10 x 16
1927 pieces, 2 x 8 x 12
96 pieces, 2 x 8 x 14
250 pieces, 2 x 8 x 16..... 75,318 feet

Tongued and grooved.

132 pieces, 2 x 12 x 14
73 pieces, 2 x 12 x 16
138 pieces, 2 x 12 x 18
4 pieces, 2 x 10 x 12
161 pieces, 2 x 10 x 14
827 pieces, 2 x 10 x 16
1665 pieces, 2 x 8 x 14
295 pieces, 2 x 8 x 16
31 pieces, 2 x 8 x 18
117 pieces, 2 x 6 x 14..... 77,324 feet
884 pieces, 1 x 10 x 16
356 pieces, 1 x 10 x 14..... 16,292 feet
47 pieces, 3 x 6 x 14
831 pieces, 3 x 6 x 16
8 pieces, 2 x 4 x 16
16 pieces, 2 x 4 x 14..... 21,063 feet
Roofing lath..... 26,856 feet

9 *Iron Work.*

52 caps for wood posts.
9 caps for wood posts.
65 base plates for wood posts.
1 double column, 1815 pounds.
22 wall plates, 32 pounds each.
2 sliding door tracks.
89 tie straps.
26 shelf brackets, 4 pounds each.
72 truss bolts.
144 truss bolts.
1 manhole door and frame.
8 square fenders.
2 round fenders.
6 anchor bolts and plates.
170 $\frac{3}{8}$″ x 3$\frac{1}{2}$″ lagscrews.
42 kegs 8d. cut nails.
30 kegs 10d. cut nails.
80 kegs 40d. cut nails.
78 kegs 8d. wire nails.
5 kegs 60d. wire nails.
3 bbls. Portland cement
206,000 hard brick.
2 tons mortar color.
3 x 12 spruce flooring, 18,912 feet.
1 car terra cotta wall coping.
1 car eye beams.
1 coal stove.
4 guy lines.

2 hand ropes.
2 slings.
3 double wood blocks.
3 single wood blocks.
1 double iron block.
1 single iron block.
1 grindstone.
18 canal barrows.
6 mortar hoes.
6 long handled shovels.
6 short handled shovels.
12 buckets.
100 feet hose.
1 12-ft. hand pump.
2 ladders.
2 sledge hammers.
1 stone bar.
10 4 iron rollers.
2 wood rollers.
1 crab.
450 feet of old canvas.
1 two-wheeled cart.

That on the 9th day of February, 1900, the plaintiff demanded the said chattels from the defendant, in those possession the same then wrongfully were; but that the defendant neglected and refused, and does continue to neglect and refuse, to deliver the said chattels or any of them to the said plaintiff; and has as aforesaid converted the same to its own use.

By reason of the premises the plaintiff has suffered great damages, to wit, damages in the sum of twelve thousand (12,000) dollars.

W. H. SPENCER,
Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Bankrupts.

Endorsed: 42. November term, 1900. W. H. Spencer, etc., *vs.* Duplan Silk Co. Filed Oct. 18, 1900. Statement of claim. R. E. Wright, &c.

In the Court of Common Pleas of Lehigh County, of Nov. Term, 1900.

W. H. Spencer, etc., *vs.* Duplan Silk Company. } No. 42.

And now, Nov. 13, 1900, plaintiff, by his attorney, enters rule on defendant to plead within ten days or judgment.

R. E. WRIGHT, *Attorney.*

Endorsed: No. 42. Term, 1900. W. H. Spencer, *et al.*, *vs.* Duplan Silk Company. Præcipe for rule to plead.

11 In the Court of Common Pleas of Lehigh County, of Nov. Term, 1900.

W. H. SPENCER ET AL. *vs.* DUPLAN SILK COMPANY. } No. 42.

And now, Nov. 13, 1900, plaintiff, by his attorney, enters rule on defendant to plead within ten days or judgment.

From the records.

Teste: JOHN F. STINE, *Prothonotary*, Per WM. H. SNYDER, *Deputy*.

Endorsed: No. 42. Term, 1900. W. H. Spencer, *et al.*, trustees, *vs.* Duplan Silk Company. Rule to plead Nov. 13, 1900. Service accepted. Frank Jacobs, attorney for defendant.

STATE OF PENNSYLVANIA:

Lehigh County Common Pleas Court, of November Term, 1900.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Bankrupts, *vs.* DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York. } No. 42.

Petition for Removal to the Circuit Court of the United States for the Eastern District of Pennsylvania.

To the honorable the judges of the court of common pleas, held in and for the county of Lehigh:

Your petitioner, The Duplan Silk Company, respectfully shows to this honorable court that it is the above named defendant in this suit: that said above entitled suit is of a civil nature; and that the matter and amount in dispute in this suit exceeds the sum or value of two thousand dollars ($2,000), exclusive of interest and costs; and

12 That the controversy in this suit is wholly between citizens of different States: that the plaintiff, W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, was, at the time of the commencement of this suit and still is a citizen of the State of

Pennsylvania, residing at Williamsport, in said State; and the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, were, at the time of the commencement of this suit and still are citizens of the State of Pennsylvania; and that the defendant, The Duplan Silk Company, your petitioner, was, at the time of the commencement of this suit, and still is, a citizen of the State of New York and of no other State—the said company having been organized under the laws of the State of New York; that your petitioner never was incorporated under the laws of Pennsylvania or any State other than the State of New York; that your petitioner has its principal office at New York city, in the State of New York; and that your petitioner desires to remove this suit before the trial thereof, into the next circuit court of the United States, to be held in the eastern district of Pennsylvania.

And your petitioner offers and files herewith a bond with good and sufficient surety, for your petitioner's entering in the United States circuit court, for the eastern district of Pennsylvania, at the first day of its next session, a copy of the record in this suit, and for its paying all costs that may be awarded by said circuit court, if said circuit court should hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays your honorable court to proceed no further herein except to make the order of removal required by law, and to accept this petition and bond, and to cause the record herein to be removed into said circuit court of the United States for the eastern district of Pennsylvania.

And your petitioner will ever pray, etc.

DUPLAN SILK COMPANY,
By H. SCHNAKENBERG, *Treasurer.*

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Schnakenberg, being duly sworn according to law, deposes and says that he is the treasurer of The Duplan Silk Company, your petitioner, and that the statements set forth in the foregoing petition are true.

HENRY SCHNAKENBERG.

13 Sworn to and subscribed before me this 15th day of November, A. D. 1900.

R. M. G. DODGE,
Notary Public.

Kings Co. certificate filed in New York Co.

STATE OF NEW YORK, }
County of New York, } *ss:*

I, William Sohmer, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court

of record, do hereby certify that R. M. G. Dodge, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the 15th day of November, 1900.

WM. SOHMER, *Clerk.*

Endorsed: No. 42. Nov. term, 1900. Spencer, trustee *vs.* Duplan Silk Co. Petition for removal of case to U. S. circuit ct. Filed Nov. 19, 1900. D.

In the Court of Common Pleas for the County of Lehigh, November Term, 1900.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York. } No. 42.

Bond.

Know all men by these presents that we, The Duplan Silk Company, the defendant in the above cause, as principal, and
14 Wm. Jay Turner, of Philadelphia, Pa., as surety, are held and firmly bound unto W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupt, the plaintiff in the above entitled cause, in the sum of five hundred dollars ($500), lawful money of the United States of America, to be paid to the said plaintiff, his certain attorney, successor or assigns, to which payment well and truly to be made, we and each of us bind and oblige ourselves and our and each of our successors and assigns and every of them, firmly by these presents.

Witness, the seals of the said The Duplan Silk Company, and the said Wm. Jay Turner, this 16th day of November, A. D. 1900.

Whereas, a suit has been brought against the said The Duplan Silk Company, by the said W. H. Spencer, trustee as aforesaid, to the above entitled court, term and number;

And whereas, the said The Duplan Silk Company, the defendant as aforesaid, has filed its petition in the said cause for the removal thereof, and of all proceedings and process thereunder into the circuit court of the United States for the eastern district of Pennsylvania.

Now the condition of this obligation is such, that if the said, The Duplan Silk Company, defendant in this cause and petitioner as aforesaid, shall enter in the said circuit court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs which may be awarded by the said circuit court of the United States if the said court shall hold that said suit was wrongfully or improperly removed thereto and shall cause to be done such other and appropriate acts as by the act of Congress, approved March 3, 1875, and other acts of Congress are required to be done for the removal of a suit in the United States circuit court from a State court, then this obligation to be void; but otherwise to be and remain in full force and virtue.

DUPLAN SILK COMPANY,
By H. SCHNAKENBERG, *Treasurer*.
WM. JAY TURNER.

Sealed and delivered in the presence of
A. RATH.

As to Wm. J. Turner.
JOHN HOFFMEISTER.

Endorsed: 42. Nov. T., 1900. Court of common pleas, Lehigh county. No. 42. Nov. T., 1900. Spencer, trustee, *vs.* Duplan Silk Co. Bond. Filed Nov. 19, 1900. D

15 In the Court of Common Pleas of Lehigh County, November Term, 1900.

W. H. SPENCER, Trustee, &c., *vs.* DUPLAN SILK COMPANY. } No. 42.

Now, November 19, 1900, upon petition of defendant it is ordered that a rule be granted on the plaintiffs to show cause why the record of the above stated case shall not be removed to the circuit court of the United States for the eastern district of Pennsylvania, and the bond of the said defendant in the sum of five hundred ($500) dollars with William J. Turner as surety be approved. And that all proceedings in the said case in the court of common pleas of Lehigh county be stayed in the meantime. Rule returnable third Monday of December next.

By the court:

EDWIN ALBRIGHT, *P. J.*

Endorsed: No. 42. Nov. term, 1900. Spencer, trustee, *vs.* Duplan Silk Co. Rule. Filed Nov. 19, 1900.

In the Court of Common Pleas of Lehigh County, November Term, 1900.

W. H. SPENCER, Trustee, &c., *vs.* DUPLAN SILK COMPANY. } No. 42.

Now, November 19, 1900, upon petition of defendant it is ordered that a rule be granted on the plaintiffs to show cause why the record of the above stated case shall not be removed to the circuit court of the United States for the eastern district of Pennsylvania, and the bond of the said defendant in the sum of five hundred dollars ($500) with William J. Turner as surety be approved; and that all the proceedings in the said case in the court of common pleas of Lehigh county be stayed in the meantime. Rule returnable third Monday of December next.

From the records.

Teste: JOHN F. STINE,
Prothonotary,
Per WM. H. SNYDER, *Deputy.*

16 Endorsed: 42. Nov. T., 1900. W. H. Spencer, trustee, &c., *vs.* Duplan Silk Company. Rule. Nov. 22, 1900. Service accepted. R. E. Wright, for plaintiff.

In the Court of Common Pleas of Lehigh County, November Term, 1900.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Bankrupts, *vs.* DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York. } No. 42.

Now, November 19, 1900, a rule having been granted on November 19, 1900, on the plaintiff in the above stated case to show cause why the record of said case should not be removed to the circuit court of the United States for the eastern district of Pennsylvania, and the bond of the above named defendant in the sum of five hundred dollars ($500) with William J. Turner as surety be approved and said rule having been served on Robert E. Wright, counsel of record for said plaintiff, returnable the third Monday of December, 1900.

Upon due consideration it is ordered that said rule be made absolute, and that all proceedings in the above stated case in said court of common pleas of Lehigh county be stayed, that the record of said case be removed to the United States circuit court for the eastern district of Pennsylvania, and that the bond of the said defendant in

the sum of five hundred dollars ($500) with William J. Turner as surety, conditioned that it will enter a copy of the record in said case in the said circuit court of the United States on the first day of its next sessions and that it will well and truly pay all costs which may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall cause to be done such other and proper acts as by the act of Congress, approved March 3, 1875, and other acts of Congress are required to be done in the premises, be approved.

By the court.

EDWIN ALBRIGHT, *P. J.*

Endorsed: No. 42. November term, 1900. In the court of common pleas of Lehigh county. W. H. Spencer, trustee, &c., *vs.* Duplan Silk Co. Order of court. Filed Dec. 19, 1900. Frank Jacobs, attorney at law, Allentown, Pa.

17 STATE OF PENNSYLVANIA, } *ss:*
Lehigh County, }

I, John F. Stine, prothonotary of the court of common [SEAL.] pleas in and for said county, certify that the foregoing is a full and correct copy of the whole record of the case herein stated, wherein W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, are plaintiffs, and Duplan Silk Company, a corporation organized and existing under the laws of New York, is defendant, as the same remains of record before the said court, at No. 42 of November term, A. D. 1900.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of Allentown, the 8th day of March, A. D. 1901.

JOHN F. STINE,
Prothonotary.

STATE OF PENNSYLVANIA, } *ss:*
County of Lehigh, }

I, Edwin Albright, president judge of the court of common pleas of the county aforesaid, in the said State, do hereby certify that the aforesaid named John F. Stine, by whom the foregoing exemplification and certificate and record made was at the time of so making the same, and is now the prothonotary of said court, duly commissioned and qualified; to all whose acts as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; that the seal thereto annexed is the seal of the said court; and that the said exemplification and record — in due form of law, and made by the proper officer.

Witness my hand this 8th day of March, A. D. 1901.

EDWIN ALBRIGHT,
President Judge.

STATE OF PENNSYLVANIA, } ss:
County of Lehigh, }

I, John F. Stine, prothonotary of the court of common pleas, in and for the said county, do certify that the Honorable Edwin Albright, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, president judge of the court of common pleas, orphans' court and court of quarter sessions of the peace, in and for said county, duly commissioned and qualified; to all whose acts
18 as such, full faith and credit are and ought to be given, as well in courts of judicature or elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 8th day of March, A. D. 1901.

JOHN F. STINE,
Prothonotary.

[SEAL.]

Endorsed: No. 6. U. S. C. C., E. D. of Penna. April sessions, 1901. Spencer, trustee, *vs.* Duplan Silk Co. Exemplification of record. Filed March 19, 1901. Samuel Bell, clerk.

United States Circuit Court, Eastern District of Pennsylvania.

W. H. SPENCER, Trustee in Bankruptcy of Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett and Rothrock, Bankrupts,

vs.

DUPLAN SILK COMPANY.

To the clerk of said court:

Enter my appearance for the defendant in above entitled case.

WM. JAY TURNER,
Attorney for Defendant.

March 19, 1901.

Endorsed: 6. U. S. C. C., E. D. of Pa. April sess., 1901. W. H. Spencer, trustee in bankruptcy, etc., *vs.* Duplan Silk Co. Appearance for def't. Wm. Jay Turner. Filed March 19, 1901. Samuel Bell, clerk.

Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York. } No. 6.

19 The defendant in the above entitled case pleads not guilty.

W. JAY TURNER,
Attorney for Defendant.

Endorsed: 6. C. C. U. S., E. D. of Pa. April sess., 1901. W. H. Spencer, trustee in bankruptcy *vs.* Duplan Silk Company. Plea. Wm. Jay Turner, def't's att'y. Filed April 23, 1901. Samuel Bell, clerk. H. R.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, of April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY. } No. 6.

Enter our appearance for the plaintiff in the above entitled case.

R. E. WRIGHT,
T. M. B. HICKS,
Attorneys for the Plaintiff.

May 14, 1901.

To Samuel Bell, Esq., clerk.

Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy, &c., *vs.* Duplan Silk Co. Appearance for plaintiff. R. E. Wright, T. M. B. Hicks. Filed May 6, 1901. Samuel Bell, clerk. H. R.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, of April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Co-partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY.
} No. 6.

20 For replication to the plea of the defendant, the plaintiff says, similiter.

R. E. WRIGHT,
T. M. B. HICKS,
Attorneys for the Plaintiff.

May 6, 1901.

To Samuel Bell, Esq., clerk.

Endorsed: 6. April sessions, 1901. W. H. Spencer, trustee, &c., *vs.* Duplan Silk Co. Replication. R. E. Wright, T. M. B. Hicks. Filed May 7, 1901. Samuel Bell, clerk.

And afterwards, to wit, on the 11th day of November, 1901, a jury being called, come to wit:

Samuel F. Houston,	Henry Sloyer,
Louis C. Madiera,	J. Howard Bromley,
Edwin E. Smith, Jr.,	Chas. D. Clark,
Clarence S. Bennett,	Samuel G. Scott,
Wm. R. Wright,	Henry Gransbach,
Robert E. Jarvis,	John Johnson,

who were duly sworn, &c., to try the issue joined.

And afterwards, to wit, on the 11th day of November, 1901, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at twelve thousand one hundred and eighty-three 00/100 dollars.

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, of April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY.
} No. 6.

Be it remembered, that in the said sessions, of April, 1901, came the said plaintiff into the said court, and impleaded the said defend-

ant in a certain plea of trespass, &c., in which said plaintiff
21 declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the circuit aforesaid, before the Honorable John B. McPherson, judge of the said court, the eleventh day of November, 1901, the aforesaid issue between the said parties came to be tried by a jury of the said circuit for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff and said defendant respectively offered the following evidence, to wit:

United States Circuit Court, Eastern District of Pennsylvania, April Sess., 1901.

SPENCER, Trustee,
vs.
DUPLAN SILK COMPANY. } No. 6.

McPherson, J.

MONDAY, *November* 11, 1901.

Present: T. M. B. Hicks, Esq., for plaintiff; W. J. Turner, Esq., for defendant.

It is agreed that the Duplan Silk Company is a corporation organized and existing under the laws of the State of New York, and was such at the time of the matters which are in controversy in this case.

Plaintiff's counsel offered in evidence exemplification of the entire record in the matter of the petition of James V. Bennett and Samuel W. Rothrock, partners trading as Bennett & Rothrock, for adjudication in bankruptcy, filed No. 802 in bankruptcy in the district court of the United States for the western district of Pennsylvania, duly certified under the seal of the court by the clerk of the court, and the district judge, and particularly showing the adjudication of the said James V. Bennett and Samuel W. Rothrock, partners trading as Bennett & Rothrock, to be bankrupt on January 13, 1900, and the election and qualification of W. H. Spencer, the plaintiff in this case, as the trustee of the said bankrupt estate.

22 Plaintiff's counsel offered in evidence contract dated the 30th of August, 1899, between Bennett & Rothrock and the Duplan Silk Company for the erection of a silk mill at Hazleton, Pennsylvania, which is admitted as a part of the contract, and in

relation therewith offers, duly certified by the prothonotary and presiding judge of the court of common pleas of Luzerne county, Pennsylvania, certified in accordance with the act of Congress, a copy of said contract entered of record to No. 131, on mechanics' lien docket, No. 15, in the office of said prothonotary on September 2, 1899.

And in connection therewith act of assembly of the Commonwealth of Pennsylvania, approved the 26th day of June, 1895, entitled An act to regulate building contracts, where such contracts have as part thereof, either incorporated or separately made, a stipulation that no mechanics' lien shall be filed against the building, whether by the contractor or by any sub-contractor, material man or other person, requiring that such stipulation shall be in writing and shall be recorded in the prothonotary's office in the county in which the land lies.

The offer of this contract and record and act of assembly being solely for the purpose of showing that the materials and tools, constituting all of the chattels in controversy in this case, could not legally have been furnished upon the credit of the Duplan Silk Company or of the silk mill being erected at Hazleton, Pennsylvania, by Bennett & Rothrock.

CHARLES E. WOODNUTT, having been duly sworn, was examined as follows:

By Mr. HICKS:

Q. Where do you reside?

A. At Williamsport, Pennsylvania.

Q. What connection had you with the firm of Bennett & Rothrock?

A. I had the general supervision of their work outside of the city of Williamsport.

Q. State whether or not they were at any time engaged in erecting a silk mill at Hazleton?

A. They were.

Q. Where is Hazleton?

A. In Luzerne county, Pennsylvania.

Q. For whom were they erecting this silk mill?

A. The Duplan Silk Company.

Q. State, if you know, when the work on that mill began.

23 A. At a period subsequent to the 2d of September.

Q. Of what year?

A. 1899.

Q. State whether or not after the bankruptcy of Bennett & Rothrock you made an inventory and valuation of any personal property, materials and tools of Bennett & Rothrock there?

A. I did.

Q. How did you come to do that?

A. Upon the order of the trustee of Bennett & Rothrock.

Q. Were you appointed by the referee in bankruptcy one of the appraisers for that purpose?

A. I was.

Q. Who was appointed in company with you for that purpose?

A. Edgar W. Shaffer.

Q. State what you and Mr. Shaffer did in pursuance of that appointment?

A. We went to the site of the mill, to the property.

Q. When did you do that?

A. I will have to refer to the inventory. (Referring to inventory.) That was on February 1, 1900.

Q. What did you find on that day there?

A. We found a great quantity of building material, lumber, brick, iron, cement, mortar, &c., such materials as enter into the construction of a building of that kind.

Q. State, if you know, to whom that material belonged?

A. To Bennett & Rothrock.

Q. Had you been engaged in charge of their operations in overseeing the building of that mill?

A. I had.

Q. State, if you know, to whom these materials were consigned when they came to Hazleton and were taken there?

A. The most of them were consigned to Bennett & Rothrock.

Q. What, if any of them, were not so consigned?

A. The only thing I am not clear on is the yellow pine.

Q. To whom do you think that was consigned?

A. That was consigned either to Bennett & Rothrock, or to the consignor himself, H. A. Miller.

Q. I understand the yellow pine was bought by Bennett & Rothrock from Mr. Miller?

A. Yes, sir.

24 Q. If it came to Hazleton consigned to Mr. Miller, what was then done with it?

A. It was delivered to Bennett & Rothrock.

Q. By whom?

A. By Mr. Miller.

Q. Have you a memorandum of these chattels before you?

A. I have.

Q. State whether or not, using that to refresh your memory, you can state what all these chattels were, and what at that time they were woath, in your opinion?

A. Do you want this inventory read in its entirety?

Q. I want you to state from your memory, if you have a memory refreshed by that memorandum, what those chattels were, and what at that time they were worth?

A. I find on the first page of this inventory an item of 51,914 feet of yellow pine lumber which had been framed and was in readiness to be placed in the building, that was valued at $32 a thousand, total of $1,661.24. That is made up of a long line of materials, the number of pieces, the size of each piece and the length of each piece

which is itemized here. We have one thousand feet of 5/4 yellow pine stepping at $27.50 per thousand——

The COURT: Why not put this inventory in evidence? The other side can cross-examine on such details as they desire.

By Mr. HICKS:

Q. Have you in your hand the inventory which you and Mr. Shaffer made at that time?

A. I have.

Q. Does this inventory set out all the chattels that you found there belonging to Bennett & Rothrock?

A. It does.

Q. And the valuations which you placed on them at that time?

A. It does.

Q. How long have you been connected with the business of contracting and building?

A. Since 1892.

Q. Were you familiar at the time this inventory was made with the market prices and values of the materials which you have inventoried here?

A. I was.

Q. State whether or not the values which you have placed on these chattels in this inventory were fair valuations?

A. Those prices were based on the cost price of the material
25 to Bennett & Rothrock. In other words, the prices made in this inventory were cost prices as per the bills rendered for the material delivered.

Q. Was that greater or less than the market value of this stuff at this time?

A. That was the market value. In connection with this first item which I read of 51,914 feet at $32 per thousand, that, as I stated, was for material that was framed, and that price of $32 a thousand includes the labor of framing it.

Q. What is the total valuation according to this inventory then of these chattels?

A. $11,843.64.

Q. State whether you were present in Hazleton at any subsequent time when any demand was made, or question discussed, with the manager and president of this company concerning these chattels?

A. I was.

Q. When was that?

A. I cannot give you the date. It was subsequent to this inventory.

Q. How long subsequently, as nearly as you can get at it?

A. I should think within two weeks; but I cannot fix the date.

Q. Who were present at the time this took place at this subsequent date?

A. The president of the Duplan Silk Company, Mr. Duplan, and

Mr. Lipps, the manager of the Hazleton mill, their attorney, yourself and myself.

Q. State what was said to Mr. Duplan and Mr. Lipps in behalf of the trustees, the plaintiff in this case, concerning these chattels?

A. My recollection is that the inventory was presented to him and a formal demand made for the delivery of the materials to the trustee. I cannot state the language that was used, for I do not recall it.

Q. State, if you know, whether or not these chattels were at this time, all of them, in the possession of the Duplan Silk Company?

A. They were, at the mill on the ground.

Q. What answer was made by Mr. Duplan and Mr. Lipps to this demand?

A. They refused to surrender the materials.

Cross-examination.

By Mr. TURNER:

Q. Did they state why they refused to deliver these goods to you?

A. Not to the best of my knowledge.

26 Q. What was your position with Bennett & Rothrock?

A. I had a general supervision of their work outside of the city of Williamsport.

Q. What was embraced in your duties? Did you simply look after the physical part of the work?

A. I was the estimator for Bennett & Rothrock in charge of the work. I made visits from time to time to the different buildings. I made the estimate on this building. My duties called me to the different buildings from time to time to inspect the work as it progressed, and to look after the ordering of the material, to see what materials were needed, and to list them and put them in possession of the firm, so that the materials might be purchased.

Q. You were familiar with the progress that was made upon this building from the time the contract was made?

A. I am.

Q. About the 1st of January did you visit the building?

A. I did.

Q. What was the condition of it at that time?

A. Make that question a little clearer.

Q. About how far was the building completed about the 1st of January?

A. I think about two-thirds of the walls were built; a portion of the roof was on; the bricklayers were at work there, as well as the roofers. The work was going on altogether.

Q. What do you mean when you say two-thirds of the walls were completed?

A. Two-thirds of the outside walls of the building, the brick walls.

Q. You say that the roof was going on. Would they put the roof on without the walls being completed?

A. The walls were completed at a certain point. Take one corner of the building; those walls were put up, and we started the roof at that point, and followed the bricklayers as fast as we could.

Q. Were you at the building between January 1st and the time you went to make this inventory?

A. I think I was.

Q. About when?

A. Probably the 4th or 5th of January.

Q. Were Bennett & Rothrock going ahead with the construction of the building at that time?

(Counsel for the plaintiff objects to this line of questions, first, because it is not proper cross-examination, and, secondly, because it concerns matters which are irrelevant and immaterial.
27 There was nothing in the witness' testimony in chief which could form a basis for cross-examination as to the progress of the building.)

Mr. TURNER: I think Mr. Hicks is right. I will call the witness in chief as to the condition of affairs.

Q. State if you were familiar with the condition of the account between Bennett & Rothrock and the Duplan Company?

A. No; I had nothing to do with that whatever.

Q. That was not involved in your duties in connection with the matter?

A. In no way.

Q. You have in this inventory two hundred and six thousand hard bricks, valued at $1,442? Is it not a fact that these bricks, or a very large number of them, were subsequently claimed by a firm in Allentown, and delivered to that firm?

A. I am told that they were.

Q. Do you know whether that is the fact?

A. I do not. Not of my own knowledge.

Q. How do you know that these materials that were on the ground on February 8th belonged to Bennett & Rothrock?

A. I know that they were bought by Bennett & Rothrock. I know the order was placed for them by Bennett & Rothrock. I know they were consigned to Bennett & Rothrock, with the exception as I noted a bit ago.

Q. Were you there when the goods came?

A. I was there when some of them came. Not all of them.

Q. What proportion arrived during your presence there?

A. A very small proportion.

Q. About what proportion of these twelve thousand dollars?

A. That is a question it would be impossible for me to answer.

Q. You merely supposed that they belonged to Bennett & Rothrock from the fact that you had ordered materials of like nature to be shipped there?

A. No. I know they were consigned to Bennett & Rothrock, because I handled most of the freight bills, and paid the freight on them, and receipted for a great many of them.

Re-direct examination.

By Mr. HICKS:

Q. When you went there and made this inventory, were any of these materials that you have inventoried built into this building?
A. None whatever.
Q. What condition were they in?
A. They were piled on the ground.

28 EDGAR W. SHAFFER, having been duly sworn, was examined as follows:

By Mr. HICKS:

Q. Where do you reside?
A. At Williamsport, Pennsylvania.
Q. What is your occupation?
A. My occupation is foreman in construction of the buildings.
Q. State whether or not you were in the employ of Bennett & Rothrock from August 30, 1899, to January 13, 1900?
A. I was.
Q. Were you concerned in any way for them in the construction of the mill of the Duplan Silk Company at Hazleton?
A. I was there, foreman.
Q. You were the foreman of Bennett & Rothrock in that operation?
A. Yes, sir.
Q. State whether or not you were appointed by the referee in bankruptcy one of the appraisers of the bankrupt estate of Bennett & Rothrock?
A. I was.
Q. Did you, in company with Mr. Woodnutt, make the appraisement that he testified about at Hazleton?
A. I did. I was one; yes, sir.

The COURT: Is there any dispute on the contents of this inventory?
Mr. TURNER: There is no dispute on it except one item of bricks.

By Mr. HICKS:

Q. Is this inventory correct?
A. Yes, sir. My name is attached there. It is all right.
Q. Where was this material when you inventoried it?
A. We found it on the ground of the Duplan silk mill.
Q. State, if you know, to whom this material came consigned to Hazleton?
A. The most of it to Bennett & Rothrock. I am not sure whether the yellow pine was consigned to them or to H. A. Miller.
Q. H. A. Miller is the person from whom Bennett & Rothrock bought it?
A. Yes, sir.

Q. If it came there consigned to Miller, what did Mr. Miller do with it?

29 A. He released it, of course, to Bennett & Rothrock.

Q. It came into the possession of Bennett & Rothrock?

A. Yes, sir.

Q. It seems the defendant raises here some question about some of that brick. Do you know anything about it?

A. I do.

Q. What do you know about that?

A. William H. Taylor & Company, of Allentown, claimed thirty-seven thousand of these brick.

Q. Is that all you know about it?

A. That is all I know.

Cross-examination.

By Mr. TURNER:

Q. Do you know whether those bricks were returned to Taylor, or whether Taylor took them from the ground?

A. Mr. Taylor used them right on the ground in the construction of engines pits, etc.

By Mr. HICKS:

Q. They were built into the mill afterwards?

A. They were built into the mill afterwards.

By Mr. TURNER:

Q. Do you now state that they should not have been included in the inventory?

A. Not rightfully; no, sir. They should not have been included.

By Mr. HICKS:

Q. What were those thirty-seven thousand bricks which you say in your opinion should not have been included in the inventory, inventoried at—at what value?

A. The bricks were in common with the bricks we had there. They should be at the same price.

Q. What is that price?

A. Seven dollars a thousand.

Mr. HICKS: Those bricks amount to $259. We might exclude them from consideration.

Plaintiff states that the value of the material claimed is $11,583, instead of $11,843.

Plaintiff's counsel offers in evidence inventory identified and proved by the witnesses for the purpose of showing the materials and their value.

(Plaintiff rests.)

30 *Defendant's Evidence.*

EMORY J. LIPPS, having been duly sworn, was examined as follows:

By Mr. TURNER:

Q. What is your business?
A. I am a silk manufacturer.
Q. What position do you hold with the Duplan Silk Company?
A. I am general manager.
Q. Did you, in the year 1899, make a contract between Bennett & Rothrock and the Duplan Silk Company for the erection of a mill at Hazleton?
A. Yes, sir. The Duplan Silk Company did.
Q. Did you on their behalf?
A. I did, yes; acting as their agent.
Q. State whether that is a part of the contract which was made. (Contract shown witness.)
A. Yes, sir. This is the contract that Mr. Rothrock and myself drew up in our own office and signed it there in the presence of some of our employés.

Plaintiff's counsel admits that the signature to the contract is the signature of Bennett & Rothrock.

Q. At the same time was there any other contract made?
A. There was no other contract made, but as that is a printed form, and there was not room sufficient on there to embody the clause that we wanted on there, we added another paper to it principally dealing with the lien clause, and the price per diem in case the building should not be finished on time.
Q. State whether that is the supplemental contract. (Paper shown witness.)
A. This seems to be a copy of it.
Q. What became of the original?
A. The original was filed in the recorder's office in Luzerne county, as the law required.

(It is admitted that the paper identified by the witness is the supplemental contract.)

Q. Can you state whether this is the special agreement which is referred to in this uniform contract?
A. Yes, sir. This special agreement mentioned here is that other paper that we have drawn up.
Q. Please tell us what progress was made by Bennett & Rothrock with the work comprehended under this contract.

31 (Counsel for plaintiff requests counsel for defendant to state what they now propose to prove by this witness.)

Mr. TURNER: I propose to show by this witness that the contractors, in violation of their contract, did not proceed with the work in accordance with the terms of the contract, and that in consequence of the delay upon their part, in fact, in consequence of the cessation of the work completely, that this contract was terminated on the 11th day of January, 1900, as provided in the contract.

(Question objected to, because by the contract the architect is made the judge.) (Objection overruled.)

A. Do you mean during the whole course of time they were working at the building?

Q. State what was the condition of the building on the 15th day of December, 1899, and what was the condition thereafter until the 11th of January, 1900.

A. The building proceeded for some time quite satisfactorily, but the beginning of December there were but very few people at work, and the work was very dilatory, and I myself asked Mr. Rothrock several times why he could not put more men at work, and he told me he could not get the people, he could not get them. A little later on, about the 10th or 12th of December, Mr. Rothrock came and asked for money, and he wanted me to——

(Objected to. Objection overruled.)

The WITNESS: He asked me whether we could not pay him more money than what the contract called for, because he wanted the money badly. I told him that personally I could not advance any money to him, but if he presented his case to the board of directors of the Duplan Silk Company they might favor him by advancing him money which he was not entitled to. Accordingly we had agreed upon a meeting in New York. Mr. Rothrock was present, and he presented his case, saying that he was very short of money, and unless he could get some money from us in advance he could not pay for the material he had ordered, and the men would put him into bankruptcy. We should therefore advance him money beyond what the contract called for.

(Counsel for the plaintiff object to any testimony being offered as to the state of the accounts between Bennett & Rothrock and the Duplan Silk Company, and also as to the circumstances being detailed by the witness as to conversations with Mr. Rothrock concerning their accounts, as irrelevant, and further asks that the court will strike out the testimony already introduced upon that subject.)

The court refuses to strike out the testimony.

(Exception for plaintiff.)

The WITNESS: We had a meeting in New York city, and
32 upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him fifteen thousand dollars, he would at once go to work and complete the building. Of course he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money.

We knew the material was there, and we consequently gave him the fifteen thousand dollars. That was on December 16th.

By Mr. TURNER:

Q. What was he entitled to under his contract at that time?

A. Only five thousand dollars. We had already paid him previous to that another five thousand dollars in order to help along.

Q. So the amount you had paid to the 15th of December was twenty thousand dollars, although he was entitled to but five thousand dollars?

A. Yes, sir; he was entitled to five thousand dollars when the excavations were done, and ten thousand dollars when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him five thousand dollars, and we advanced him fifteen thousand dollars more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground.

Q. What happened after that payment was made?

A. After that payment was made they began to work at it faster then, but then they stopped entirely, so that by Christmas, or a day or two after Christmas, there hardly anybody remained on the ground, and after New Year's there was no one there at all, excepting Mr. Shaffer, who was superintendent on the ground. He was the only man I met then. I think everybody else was gone. There were a few people working, digging a trench there for a heating duct, but that was under a sub-contract, and the sub-contractor had received no money, but had a bondsman in Williamsport that went on the bond of Bennett & Rothrock, and therefore he said, "If I complete my work irrespective of the failure of Bennett & Rothrock I can collect from the bondsman." Therefore he continued the work. He was the only party at work then.

Q. Was it in consequence of that condition of affairs that you sent to Bennett & Rothrock this notice? (Notice shown witness.)

A. Yes, sir. On the 6th of January it was reported that they had assigned, and five days thereafter I notified them that as they failed to prosecute the work——

By Mr. HICKS:

Q. This was a written notice?

33 A. Yes, sir. That we would take the work in our own hands.

Mr. Turner proposed to read the notice.

Mr. HICKS: There were three letters all enclosed in one communication. We object to the notice being read unless they are all read.

Mr. TURNER: I have called upon the plaintiff in this case to produce the original notice which was served upon them by Mr. Lipps, the manager of the defendant, with respect to the termination of

this contract. There happens to be some other correspondence. I do not want that. If they want to put that in they can do so.

Counsel for plaintiff states that in response to a notice of defendant he produced the communication received by Bennett & Rothrock from the Duplan Silk Company, consisting of three separate letters, all dated January 11, 1900, and all coming to Bennett & Rothrock under one cover as the communication of the Duplan Silk Company to them on that date.

The COURT: If that is the fact they ought to be all in.

Mr. TURNER: One of these notices is addressed to the Duplan Silk Company by Mr. Lipps himself. I do not object to reading them all.

Mr. Turner read in evidence the following papers:

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

GENTLEMEN: We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill building at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on Monday, January 15, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

Yours truly, DUPLAN SILK COMPANY.
E. J. LIPPS, *General Manager*."

"SOUTH BETHLEHEM, *January* 11, 1900.

Duplan Silk Company, New York city, N. Y.

I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building, in course of construction at Hazleton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their
34 failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with said Duplan Silk Company, under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided for therein.

E. J. LIPPS."

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

DEAR SIRS: Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazleton.

Yours truly, DUPLAN SILK COMPANY."

Mr. TURNER: I call your honor's attention to the fact that in this contract Mr. Lipps is specifically made, with the architects, the party in charge of the building.

Q. Who were the architects?

A. Messrs. William Steele & Son, of Philadelphia.

Q. State whether or not that is the certificate of William Steel & Son with reference to this matter?

A. Yes, sir; it is.

Certificate of William Steel & Son, dated Philadelphia, January 11, 1900, offered in evidence.

Mr. HICKS: I should like to cross-examine the witness before the paper is offered in evidence.

Q. Concerning the communication from William Steel & Son, when did you first receive that?

A. I could not say. It is undoubtedly dated. I went to William Steel & Son after they had failed to put the matter before them, because William Steel & Son——

Q. What I want to know is when you first got this paper from William Steel & Son?

A. I do not remember that now. I could not say what date it was.

Q. This paper is dated January 11, 1900. I desire to ask whether you received that paper on January 11, 1900?

A. I could not say. I went to William Steel & Son myself, and told them that I had notified these people, and I, in conjunction with William Steel & Son, acted as overseer of the building. The contract calls for that.

Q. Then, as I understand you, you sent these notices dated January 11, to Bennett & Rothrock before you received this from William Steel & Son; is that true?

35 A. It is the same date. I do not know whether I mailed this in the evening or not. I could not say that. I went to William Steel & Son and asked them whether I was right, and they said "Yes, you have authority to do it."

Q. I want to know when this was written?

A. It might have been in the morning of January 11. I am not sure of that.

Q. Do you think you received that from William Steel & Son on the morning of January 11th?

A. I could not say. I do not know what date it was.

Q. Where is the office of William Steel & Son?

A. In the Witherspoon building in this city?

Q. Your office is in South Bethlehem, Pa., is it not?

A. Yes, sir.

Q. You sent these notices of January 11 to Bennett & Rothrock from South Bethlehem, did you not?

A. I believe so; yes, sir.

Q. Were you in Philadelphia on that date?

A. I do not know as to that. I may not have been. I do not know.

Q. Then you cannot say that you received this certificate from

William Steel & Son on the 11th of January, 1900, the day it purports to be dated?

A. No, sir; I could not say that. I do not know whether I sent this notice previously to going to William Steel & Son or whether I went to William Steel & Son first and then sent the notice. I do not know.

Q. Did you not just say a few moments ago you went to William Steel & Son and told them about having sent these notices to Bennett & Rothrock, and they said to you that was right?

A. Perhaps I did.

Q. Did you not say that just a moment ago?

A. I think I did.

Q. Then is it not a fact that when you went to William Steel & Son and told them that you had sent these notices to Bennett & Rothrock, and they told you that was right, you then asked them, or subsequently to that you asked them, if not just then, to give you this written certificate that was read?

A. I think so; yes, sir.

Q. In pursuance of that request, they gave you this written certificate?

A. Yes, sir. I went there and asked them for that certificate.

36 By Mr. TURNER:

Q. As a matter of fact, had you not talked with the architects, William Steel & Son, with regard to delays in the completion of this building a number of times prior to this notice?

A. I believe I did.

Mr. Turner proposed to read certificate of William Steel & Son. (Objected to.)

Mr. Turner renewed offer of certificate of William Steele & Son, dated January 11, 1900.

(Plaintiff's counsel objected, first, because by the testimony of the witness on the stand, who has identified this notice, it was not in pursuance thereof that any notice was served under the contract upon Bennett & Rothrock. Second, because the notice does not purport to be the certificate required by the terms of the contract from the architect. Thirdly, as incompetent and irrelevant; and for the further reason that it is not shown by the evidence when this certificate was given, or that it was given before the adjudication that Bennett & Rothrock were bankrupts.)

The COURT: We will receive the paper for whatever effect it may have on the case.

(Exception for plaintiff.)

Mr. Turner read certificate of William Steel & Son, dated January 11, 1900.

By Mr. TURNER:

Q. In pursuance of that notice did you take possession of these materials on the ground?

A. Yes, sir.
Q. You went ahead and completed the building?
A. Went ahead and completed the building.
Q. When was the building actually completed?
A. I do not remember the date, but it is given in some of the papers there. It must have been some time in the summer of that same year.
Q. Were you able to complete this building for the cost price stipulated in the contract?

(Objected to as irrelevant. Objection sustained.)

Q. Were these materials actually used in the construction of the building?
A. The materials that were lying on the ground?
Q. The materials that are specified in the inventory which has been testified to here?
A. I have every reason to believe they were; yes, sir.

37 Cross-examination.

By Mr. HICKS:

Q. I call your attention to the communications consisting of these three papers, all dated January 11, 1900, which you sent on that day to Bennett & Rothrock, and ask you whether or not all three of these communications are not in your handwriting?

(Papers shown witness.)

A. Yes, sir; they are all in my handwriting.

EDGAR W. SHAFFER, recalled.

By Mr. TURNER:

Q. You stated that you were the foreman or superintendent of Bennett & Rothrock?
A. I was employed as foreman.
Q. Can you tell us when your employment ceased on this building?
A. I can by referring to my time book.

Counsel for the plaintiff requests counsel for defendant to state what they propose to prove by this witness.

Mr. TURNER: I propose to prove by this witness that the contractors absolutely stopped work on this building on the 6th of January, and probably before.

(Objected to on the ground that the written contract between the parties provides the only method, to wit, on the certificate of the architect, by which the contract permits the Duplan Silk Company to take possession of the tools and materials, and that proof by this witness as to progress of the work would therefore be immaterial under this contract.)

(Objection overruled. Exception for plaintiff.)

The WITNESS: (Referring to time book.) January 6, 1900.

Q. January 6, 1900, you left the premises?

A. Yes, sir.

Q. Were there any men working there for Bennett & Rothrock at that time?

A. Only under sub-contract.

Q. When had Bennett & Rothrock's men been withdrawn from the work?

A. Those men out of the town of Hazleton stayed there; near every man that was away from town stayed with me until I told them that Bennett & Rothrock had failed, and that was on
38 January 6. Men from Hazleton, quite a number had stopped work, dropped off occasionally. I could not give any exact date when they quit.

Q. You were one of the appraisers of these materials?

A. Yes, sir.

Q. And I think you were subsequently employed by the Duplan Company, to finish this building?

A. Yes, sir.

Q. Were these materials that are claimed in this suit used in the completion of the building?

A. They were. They were all used, with the exception of possibly four or five thousand feet, which were left, and we sold some.

Cross-examination.

By Mr. HICKS:

Q. Four or five thousand feet of what was left that you sold?

A. There was some yellow pine timber left, hemlock, and the hemlock had been partially used; scaffolding and shelving, and was sold as second-class lumber, used lumber.

Q. The Duplan Silk Company sold those things?

A. They did; they directed me to sell them.

Q. What became of the tools?

A. The tools that were left were used in the construction of the building. They were badly used. In a large building like that they were pretty well used up, but what was left, wheelbarrows and such things, I sold under their directions.

Q. You sold for the Duplan Silk Company?

A. Yes, sir. There were some that were not sold, which were retained.

Mr. Turner offered in evidence contract dated August 30, 1899, between Bennett & Rothrock and the Duplan Silk Company through E. J. Lipps, their representative and general manager.

Together with a certified copy of the special agreement referred to therein, the original of this agreement having been filed of record at Williamsport.

Mr. Turner also offered in evidence various notices read; also certificate of William Steel & Son, the architects.

(Testimony closed.)

(At 1 o'clock a recess was taken until 2 p. m.)

39 *Charge of the Court.*

McPHERSON, *J.*:

GENTLEMEN OF THE JURY: The question here is one of law, depending on the construction of these papers; and I therefore instruct you to render a verdict for the amount of the plaintiff's claim, subject to the point reserved, whether there is any evidence to go to the jury in support of the plaintiff's case. I shall examine these papers in the light of the argument of counsel, and consider whether judgment should be entered for the defendant or not.

(*Exception for Defendant.*)

And thereupon the counsel for the said defendant, Duplan Silk Company, did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to, do not appear upon the record.

The said counsel for the said defendant, Duplan Silk Company, did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge at the request of the said counsel for the said defendant, Duplan Silk Company, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 24th day of January, 1902.

JOHN B. McPHERSON, *Judge.* [SEAL.]

Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, *vs.* Duplan Silk Company. Bill of exceptions. Wm. Jay Turner, def't's attorney. Filed January 24, 1902. Samuel Bell, clerk.

United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY. } No. 6.

40 And now, November 11, 1901, comes the defendant, The Duplan Silk Company, by its attorney, Wm. Jay Turner, and moves for judgment *non obstante veredicto*, in the above entitled case.

Endorsed: 6. U. S. C. C., E. D. of Pa. April session, 1901. W. H. Spencer, trustee in bankruptcy *vs.* Duplan Silk Co. Motion for judgment *non obstante veredicto*. Wm. Jay Turner, def't's att'y. Filed January 22, 1902. Samuel Bell, clerk.

And afterwards, to wit, on the 11th day of November, 1901, come the parties aforesaid by their counsel aforesaid, and this cause being called for argument sur defendant's motion for judgment *non obstante veredicto*, and having been argued by counsel for the respective parties and the court not being fully advised in the premises, takes further time for the consideration of the same.

And afterwards, to wit, on the 18th day of January, 1902, come the parties aforesaid, by their counsel aforesaid, and the court being fully advised in the premises, renders the following opinion, viz:

United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee of Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY. } No. 6.

Motion by Defendant for Judgment Non Obstante Veredicto.

MCPHERSON, *J.*:

The facts in this case were not disputed and may be briefly outlined as follows: Bennett & Rothrock, who were contractors and builders, had agreed to erect a silk mill for the defendant in Hazleton, Pennsylvania. The 5th article of the contract is in these words:

"Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after — days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further pay-
41

ment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

The contract was not recorded, and there is no evidence that any of the creditors knew of its provisions. On January 13, 1901, a large quanity of building material was upon the ground in the neighborhood of the mill, having been brought to that point for the purpose of being built into the structure in accordance with the contract. This material was the absolute property of Bennett & Rothrock, having been bought with their money, or on their credit, and delivered to them without conditions. Upon January 13, Bennett & Rothrock, having filed a voluntary petition, were duly adjudged bankrupts, and W. H. Spencer, the present plaintiff, was afterwards elected their trustee. He thereupon demanded delivery of the material from the defendant, by whom possession had been taken, but delivery was refused and the material was converted to the defendant's use by being built into the mill. This action of trover was accordingly begun to recover the value of the property thus converted.

Two defenses are urged to the suit, of which the first is founded on the fifth article of the contract and upon certain action taken thereunder. This action was as follows: E. J. Lipps is named in the contract as general manager of the defendant company, and William Steele & Son as architects, these three persons being empowered to act for the purposes of the contract as agents of the silk company. Early in January, owing to the increasing financial difficulties of Bennett & Rothrock, work on the building had nearly ceased, and on January 6, or perhaps even earlier, the contractors practically abandoned the enterprise. On January 11 Mr.
42 Lipps, whose office was in South Bethlehem, some miles distant from Hazleton, addressed the following letter to the defendant:

"SOUTH BETHLEHEM, *January* 11, 1900.

Duplan Silk Company, New York city, N. Y.:

I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building in course of construction at Hazleton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with the said Duplan Silk Company under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided therein.

E. J. LIPPS."

This letter states that Mr. Lipps was acting as "overseer and contractor for the architects for the Duplan Silk Company building in course of construction at Hazleton, Pa.;" but there is no evidence that he had any such authority to act for the architects. He himself did not so testify, nor were the architects called to corroborate the allegations contained in the letter; while the contract declares him to be, what in truth he was, the general manager of the defendant, and one of its agents for the purposes of the contract. The letter just quoted was delivered by Mr. Lipps to himself as the general manager of the defendant, and thereupon, acting now as the Duplan Silk Company, he wrote and mailed to Bennett & Rothrock, upon the same day, the following letter:

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

DEAR SIRS: Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazleton.

Yours truly, DUNLAP SILK COMPANY."

This letter was enclosed with a communication also written by Mr. Lipps, the "notification" referred to therein being the first of the letters just quoted:

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

GENTLEMEN: We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill build-
43 ing at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on Monday, January 15, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

Yours truly, DUPLAN SILK COMPANY,
E. J. LIPPS,
General Manager."

After these communications had been written and sent Mr. Lipps came to Philadelphia, where the architects lived, and obtained from them the following paper:

"PHILADELPHIA, *January* 11, 1900.

Whereas we are informed by E. J. Lipps, general manager for Duplan Silk Company, and who has been in charge of the construction of a certain building in Hazleton, Pa., which has been in the course of erection under a contract entered into between Duplan Silk Company and Bennett & Rothrock, contractors, that the contractors in violation of their said contract have since January 6th abandoned

work upon the said contract, and that he has notified the contractors of the intention of the Duplan Silk Company to terminate the employment of the contractors and to complete the operation, we hereby certify our approval of said action and declare that the neglect and failure of the contractors was sufficient ground for the same.

WM. STEELE & SON."

This certificate is dated January 11, and, in the absence of definite evidence to the contrary, that date may be assumed to be correct, although I have no doubt that the certificate was not obtained until a later day. At all events, it was the last step in the transaction instead of the first. Pursuant to these notices, the defendant entered upon the premises, and on January 15 took possession of the material heretofore referred to, this being two days after the title of the bankrupts had passed by operation of law to their trustee.

It must be conceded, I think, that there are serious difficulties in the defendant's path. In the first place, the express terms of article 5 make the architects' certificate a condition precedent to the termination of the employment, and it appears by the undisputed evidence that no such certificate had been given at the time the contractors were notified that their employment had been brought to an end. It is true that Mr. Lipps professed to give such a certificate as "overseer and contractor for the architects," but as I have already stated, there is no evidence that he occupied this position or was authorized to act for them in such a matter. On the contrary, the clear evidence is that he was simply the general manager of the defendant
44 and one of the overseers of the building upon its behalf.

Neither, I think, can the certificate of the architects—assuming it to have been given on January 11—be properly regarded as a ratification of Mr. Lipps' previous action, for the contract, as I think, certainly contemplates that the architects shall act upon their own knowledge in giving a certificate that is to be followed by such serious consequences to the contractors, while it will be observed that the architects do not profess to act upon what they themselves have observed of the contractors' failure to go on with the work, but plant themselves distinctly upon the information that is said to have been received from Mr. Lipps. It is doubtful whether such a certificate is sufficient to sustain a forfeiture of the contractors' property, and the decision of the case might perhaps be put upon this ground; but there are other difficulties that seem to be as serious, and one of them perhaps even more difficult to overcome. The 5th article of the contract, it will be noticed, provides that the company may, in a certain contingency, "enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor." This clause contemplates that the silk company might do either one of two things; it might enter upon the premises and use the material there to be found for the purpose of completing the work, or it might enter upon the prem-

ises and provide its own material for the same purpose. Now it is plain from the foregoing notices, that the declared purpose of the company is simply to "enter and take possession of the above named premises," and that nothing whatever is said about an intention to take possession of the contractors' material. Under this ambiguous declaration, therefore, the entry might well be regarded as being simply for the purpose of providing other material and going on with the work, and I think it very doubtful whether such a notification—which must of course be strictly construed, as the purpose was to enforce a forfeiture—was sufficient to justify the silk company in taking possession of the contractors' bricks, lumber and other property on the ground.

But in addition to these difficulties, there is the more serious objection, that, even if the silk company is to be regarded as having correctly attempted to exercise a privilege reserved to it by the contract, nevertheless that privilege cannot be successfully invoked against the title of the trustee in bankruptcy. It is urged by the company, that the title of the trustee is no greater than the title of the bankrupts; and that, as the privilege reserved by the 5th article of the contract could undoubtedly have been enforced against the bankrupts themselves, it is enforceable against the trustee also. It is no doubt true, speaking generally, that under section 70*a* the trustee takes no better title to the property than the bankrupt himself possessed; but there are exceptions to this statement, as plainly appears from other provisions of the act. Under certain circumstances the trustee is the representative of the creditors rather than of the bankrupt, in relation to the property of the estate, and he may unquestionably exercise rights, and enforce a title, that the bankrupt himself could neither enforce nor exercise. For example, with regard to property that the bankrupt has fraudulently transferred, the trustee may undoubtedly recover it for the estate, although it is also undoubted that the bankrupt himself could not undo his own fraudulent transactions. So also, it is provided by the act, in section 67, clause *a*—and this closely concerns the subject now in hand—that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." Whatever may be the character of the right, or the privilege, reserved to the defendant company by the 5th article of the contract, it cannot be more binding upon the bankrupt estate than if it were a lien, and it may, therefore, properly be treated as if that were its true nature. Under the law of Pennsylvania, as repeatedly declared by its highest court, it is beyond controversy that this right to take possession of the bankrupts' material could not have been enforced against other creditors of the bankrupt, seeking to enforce their own claims by appropriate legal process. If, for example, another creditor of the bankrupts had obtained judgment against them and had levied upon the property in question, the silk company could not have defeated the execution by attempting to exercise its right to take possession of the bankrupts' material. Secret liens against

property are obnoxious to the law of Pennsylvania, and at the best the privilege now sought to be invoked by the silk company was a secret lien, and not made known to the public by being put upon record—indeed, there is no provision of law for recording such contracts—and not actually disclosed to the creditors so far as appears from the testimony now before the court. I think, therefore, it is clear that the trustee under section 67*a* is entitled to invoke the aid of the law of Pennsylvania to prevent the enforcement of this privilege, although the bankrupts themselves might not have been allowed so to do; and, if the Pennsylvania law upon this subject is applicable, there can be no doubt that the defence now under discussion is unavailing.

The second defence only needs a few words. It was proved, that in December, 1900, the bankrupts applied to the silk company for an advance of money, and that the company advanced them $15,000 more than the contract required, believing—so it was testified by Mr. Lipps—that the material upon the ground was sufficient security for this sum. It is urged that this transaction was equivalent to a pledge of this material, and therefore that the company was justified in taking possession of it in repayment of the advance. The
46 testimony, in my opinion, does not justify such a conclusion. It does not show that a contract of pledge was made between the bankrupts and the company; but, at the most, only shows that the company probably believed that, if the contractors should get into difficulties, there was enough material on the ground that could be taken possession of by the company under the 5th article to reimburse the sum advanced. Even assuming, however, that a contract of pledge was actually made, it would be ineffective, because no possession was ever taken by the silk company under the contract, and therefore if under such circumstances any lien could be said to exist, it would be a secret lien, and, like the privilege reserved under the 5th article, would also be stricken down by the Pennsylvania law in favor of other creditors.

It is, I think, unnecessary to pursue the subject further. In my opinion, the plaintiff is entitled to recover, and the defendant's motion for judgment notwithstanding the verdict is accordingly refused.

Exception to the defendant.

Endorsed: 6. April session, 1901. Spencer, trustee, *vs.* Duplan Silk Co. Opinion refusing defendant's motion for judg. *non obstante veredicto*. Filed January 15, 1902. Samuel Bell, clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Co-partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY. } No. 6.

Enter judgment against the defendant on the verdict of the jury, *sec. leg.*

T. M. B. HICKS,
Attorney for the Plaintiff.

January 17, 1902.

To Samuel Bell, Esq., clerk.

Endorsed: No. 6. April S., 1901. Spencer, trustee, *vs.* Duplan Silk Co. Precipe for judgment. T. M. B. Hicks. Filed January 18, 1902. Samuel Bell, clerk.

47 United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY. } No. 6.

Assignment of Errors.

The defendant in this action in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred upon the trial of the cause, to wit:

1st. The court erred in directing the jury to find a verdict for the plaintiff.

2nd. The court erred in overruling the defendant's motion for judgment *non obstante veredicto.*

3rd. The court erred in entering judgment upon the verdict in this case in favor of the plaintiff and against the defendant.

WM. JAY TURNER,
Attorney for Defendant.

Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, *vs.* Duplan Silk Company. Assignment of errors. Wm. Jay Turner, def't's att'y. Filed January 24, 1902. Samuel Bell, clerk.

United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY.
No. 6.

48 *Petition for Writ of Error.*

And now, January 24, 1902, comes The Duplan Silk Company, defendant herein, by its attorney, Wm. Jay Turner, and says that on the 15th day of January, 1902, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which more in detail appear from the assignment of errors which is filed with this petition. Wherefore this defendant prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the third circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said circuit court of appeals.

WM. JAY TURNER,
Attorney for Defendant.

Allowed
BY THE COURT.

Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy of the estate of James V. Spencer and Samuel W. Rothrock, partners as Bennett & Rothrock, *vs.* Duplan Silk Company. Petition for writ of error. Wm. Jay Turner, def't's att'y. Filed January 24, 1902. Samuel Bell, clerk.

United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY.
No. 6.

Bond Sur Writ of Error.

Know all men by these presents, that we, The Duplan Silk Company, as principal, and The City Trust, Safe Deposit and Surety Com-

pany of Philadelphia, surety, are held and firmly bound unto the plaintiff, W. H. Spencer, trustee in bankruptcy of Bennett &
49 Rochrock, in the just sum of twenty-four thousand three hundred and sixty-six dollars ($24,366) to be paid to the said plaintiff, his certain attorneys, executors, administrators, successors in the trust, or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this twenty-fourth day of January, A. D. 1902.

Whereas lately in the United States circuit court for the eastern district of Pennsylvania, in a suit depending in said court between W. H. Spencer, trustee in bankruptcy of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, plaintiff, and The Duplan Silk Company, defendants, a judgment was rendered against the Duplan Silk Company, and the said Duplan Silk Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said W. H. Spencer, trustee in bankruptcy of Bennett & Rothrock, *cited* and admonished him to be and appear at the session of the United States circuit court of appeals for the third circuit, to be holden at the city of Philadelphia, in said circuit, on the first Tuesday of March next.

Now the condition of the above obligation is such that if the said Duplan Silk Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, otherwise to be and remain in full force and virtue.

DUPLAN SILK COMPANY,
[SEAL.] By FRITZ ELBERS, *2d Vice-President.*

Sealed and delivered in the presence of
HENRY GIGERICH.

Attest: H. SCHNAKENBERG, *Secretary.*

THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA,
By JOS. A. SINN, *2d Vice President.*

Attest: JAS. F. LYND, *Secretary.* [SEAL.]

Approved
BY THE COURT.

50 Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, *vs.* Duplan Silk Company. Bond sur writ of error. Wm. Jay Turner, def't's att'y. Filed January 24, 1902. Samuel Bell, clerk.

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true andfaithful copy of the original pleas and proceedings in the case of W. H. Spencer, trustee, *vs.* Duplan Silk Company, No. 6, April sess., 1901, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 4th day of February, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

SAMUEL BELL,
Clerk C. C.

[SEAL.]

51 And afterwards to-wit: on the seventh day of March, A. D. 1902, this cause being called for argument on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, before Hon. M. W. Acheson, Hon. George M. Dallas and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to-wit: on the seventh day of May, A. D. 1902 comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to-wit:

In the United States Circuit Court of Appeals for the Third Circuit.

DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of New York, Plaintiff in Error,
vs.
W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennet & Rothrock, Defendant in Error.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Acheson, Dallas, and Gray, circuit judges.

GRAY, *J.:*

This was an action of trover, called under the Pennsylvania practice act of 1887 an action of trespass. It was brought by the defendant in error, as trustee in bankruptcy of the estate of Bennett & Rothrock, who were contractors and builders, against the Duplan Silk Company, charging the conversion of certain chattels, consist-

ing principally of lumber, iron work, nails, cement, brick and
52 sundry builder's utensils, of which a complete schedule is given in plaintiff's statement. There is little or no dispute about the essential facts in the case, as disclosed by the evidence. They are substantially as follows:

Bennett & Rothrock were builders, and, as such, entered into a written contract with the Duplan Silk Company, bearing date August 30th, 1899, to erect a silk mill for the defendant at Hazleton, Pa., providing all materials and performing the work mentioned in the specifications and shown in the drawings prepared by the architect. By this contract, it was provided that the sum to be paid by the owner to the contractor, for said work and materials, should be $76,000., payable in instalments as the work progressed to certain specified stages, the first instalment being $5,000.—and the remaining ones $10,000.—each. On the same day, a supplemental contract, according to the form of contract recommended for general use by the American Institute of Architects, was executed between the parties.

About December 15th, 1899, when the excavations and foundation walls and piers had been completed, and the brick walls partly built, work on the building was lagging. Although, according to the terms of the contract, only the first instalment of $5,000.— had become due, and it had been paid, Rothrock, one of the contractors, came to Emory J. Lipps, general manager of the Duplan Silk Company, and through whom, as its agent, the building contract was made, and asked whether certain moneys could not be advanced beyond what the contract called for. Lipps told him that, personally, he could not advance any money, but that if he presented his case to the board of directors of the Duplan Silk Company, they might be willing to do so. Accordingly, on December 16th, there
was a meeting in New York city, between Rothrock and those
53 representing the company, at which Rothrock stated that he was very short of money, and that unless he could get some from the company in advance, he could not pay for the material he had ordered, and the men would put him into bankruptcy. They had already made him a payment of $5,000.— and no other instalment was then due. The testimony of Lipps, as to the transaction between the parties, proceeds as follows:

"We had a meeting in New York city, and upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him $15,000., he would at once go to work and complete the building. Of course he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money. We knew that material was there, and we consequently gave him the $15,000. That was on December 16th.

* * * * * * *

"Q. So the amount you had paid to the fifteenth of December was $20,000., although he was entitled to but $5,000.?

"A. Yes, sir; he was entitled to $5,000. when the excavations were done, and $10,000. when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him $5,000., and we advanced him $15,000. more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground."

After this money was advanced, work was continued for a short time, and by Christmas, or a day or two thereafter, it was practically abandoned. On the 13th of January, 1900, Bennett & Rothrock, on their own petition, were adjudicated bankrupts, and W. H. Spencer, defendant in error, was duly appointed and qualified as trustee of their estate. The chattels in controversy were scheduled among their assets, and there were numerous judgments against them, and executions issued thereon, when the petition was filed and the adjudication made.

On January 11th, 1900, certain letters from the Duplan Silk Company were sent to and received by Bennett & Rothrock, and, as they appear in the record, are as follows:

54 "SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

GENTLEMEN: We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill building at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on Monday, January 15, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

Yours truly, DUPLAN SILK COMPANY.
E. J. LIPPS, *General Manager*."

"SOUTH BETHLEHEM, *January* 11, 1900.

Duplan Silk Company, New York city, N. Y.

I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building, in course of construction at Hazleton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with said Duplan Silk Company, under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided for therein.

E. J. LIPPS."

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

DEAR SIRS: Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazleton.

Yours truly, DUPLAN SILK COMPANY."

It is admitted by counsel for plaintiff in error that these letters were intended to be pursuant to the 5th article of the supplemental contract, which provides as follows:

"Art. 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after — days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor
55 he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

On January 15th, the plaintiff in error took exclusive possession of the building materials and tools, which constitute the property in controversy in this action, and which had been brought upon the premises by Bennett & Rothrock for the purpose of being incorporated in the mill, for the building of which they were contractors. The plaintiff in error then proceeded to use the materials in the erection of the building, upon which Bennett & Rothrock had defaulted. Thereafter, Spencer, defendant in error, as the trustee of the bankrupt estate, demanded from the plaintiff in error these materials. The demand was refused; whereupon, this action of trover for the recovery of the same was commenced by the said trustee.

Upon this evidence, the court below gave a binding instruction in favor of the plaintiff below, reserving the question of law, whether there was any evidence to go to the jury in support of the plaintiff's claim, and subsequently, on the motion of defendant below for judgment, *non obstante veredicto*, directed judgment to be entered for the plaintiff and against the defendant.

The question for the court here is, would the court, upon this

state of facts, have been justified in giving to the jury a binding instruction to find for the plaintiff?

The learned judge of the court below regarded the notices given by the owner to the contractor, on the 11th of January, and the subsequent taking possession, on the 15th of January, of the
56 materials brought on the premises by the contractor for the purposes of the building, as proceedings to enforce a forfeiture under article 5 of the supplemental contract, and as such to be strictly construed. Taking this view of the character of the provisions of said article 5, he decided that there had not been such a strict compliance by the owner with the requirements of said article 5, as to entitle it to claim a forfeiture, and that the unqualified and absolute property in the materials in question, passed to the trustee of the bankrupt contractor on the date of the adjudication of the bankruptcy. It was on this view, principally, that the judgment was entered which was equivalent to peremptory instructions to the jury to find for the plaintiff. On the undisputed facts, however, of this case, we think there was fundamental error in the position thus taken by the court below.

We do not think that the notice given by the owner, on the 11th of January, and the certificate of the architects on the same day, or the taking exclusive possession of the materials on the ground, on the 15th of the same month, are to be regarded as steps to enforce a forfeiture, nor that the right reserved to the owner under article 5 of the supplemental contract, is to be held as a stipulation to that effect.

The contract between the parties, contained in said article 5, is to be construed by its plain terms. So construed, it provides a particular mode, by which the owner of the premises may enforce the general security, evidently intended to be given him, by the materials brought on to the ground by the contractor, and appropriated by him to the purposes of the building under construction. In this, we discover no features of a technical forfeiture. The strictness with which it is sometimes said that a contract involving forfeiture
57 must be construed, is not applicable here. The stipulation is to be neither strictly nor loosely construed, but must be dealt with so as to fairly effect the meaning of the parties, as expressed by the language they have used in their contract. There is in the provision that the owner may, in case of default by the contractor, proceed to finish the building himself, and to that end use materials brought by the contractor on the ground for the purposes of the building, no suggestion of loss of property to the contractor, by way of punishment or penalty. On the contrary, the stipulation carried out under the circumstances described, would tend to minimize the loss that would otherwise accrue to the contractor from his own default.

Looking, then, at article 5 to discover the intent of the parties as to this stipulation, we think it is clearly apparent to have been, that the materials brought by the contractor upon the premises, and appropriated to the building contracted for, should be considered as

so far delivered into the possession of the owner, as to make them a security for the advances made by the owner. A *quasi* or qualified right of property in these materials by the owner of the soil, and a possession not inconsistent with the builder's right and duty to incorporate them in the building, would thus result from their delivery by the contractor on the premises, and their appropriation to the construction of the building.

In this view of the case, we are not here concerned with the question, whether the plaintiff in error precisely complied with all the requirements of article 5, in taking steps to make effectual the security furnished by the materials brought by the contractor on the ground. The general contract as to this matter must be taken to mean something, and it would be of little avail to say that
58 the plaintiff in error can take the steps prescribed in article 5 to make this security available, if the materials themselves could be taken away, as claimed by defendant in error, by the execution of a creditor or the action of a trustee in bankruptcy. The effect of the whole contract between the parties, including article 5 of the supplemental contract, in whatever terms it may be described, was to affix to the materials brought upon the ground and appropriated to the building by the contractor, a charge or interest in favor of the plaintiff in error, consistent with the qualified ownership of the defendant in error, but commensurate with the requirement, that they should furnish security to the plaintiff in error for the performance of the contract and for advances made.

The special oral agreement of December 16th, 1899, as set forth in the testimony of Mr. Lipp, general manager for the plaintiff in error, which is not contradicted or disputed, may be taken as a specific appropriation of the materials at that time delivered on the premises of plaintiff in error, as security for the advances then made, freed from the requirements of notice and certification by the architect, contained in the 5th article of the supplemental agreement; and as making effective and available at once the inchoate lien or title of the plaintiff in error to said materials. In other words, by this oral agreement, the qualified possession of these materials by plaintiff in error, was made immediate and unqualified. The security originally intended by the parties, was perfected as to the advances then made.

Nor in this view of the mutual rights of the parties, can it be contended that this oral agreement of December 16th, 1899, was an unlawful preference, in fraud of the bankrupt law. It was not a new and independent contract, but a recognition of the old contract, and in furtherance and consummation of its intent. A mort-
59 gagor, who puts his mortgage into actual and unqualified possession of the chattels mortgaged, instead of compelling him to take the formal steps for a foreclosure, is acting in furtherance of the original contract, not making a new one, in the sense that would, in this case, transgress the inhibition of the bankrupt law as to preferential conveyances.

Unquestionably, the defendant in error could not have been

heard to challenge the legal and binding effect of this contract, as above described; but their counsel now contend that, even though it be good between the parties, their immediate representatives and volunteers, this contract cannot bind third parties without notice, and that *bona fide* judgment creditors could have levied upon and sequestered the materials here in question, unaffected by the contract, even though admitted to be binding between the parties. And if creditors could have so attached the property, free from any claim on the part of the plaintiff in error, then it is argued that, under the provisions of section 70 of the bankrupt law, which gives to the trustees any property which might have been levied upon and sold under judicial process against the bankrupt, the unqualified property in these materials vested in the trustee. The statute of Elizabeth, as in force in Pennsylvania, is invoked to declare illegal against creditors any conveyance, pledge or charge of property, unaccompanied by delivery or change of possession, and the court below, taking this view, relies upon section 67, clause (*a*), of the bankrupt law, which provides that "claims which for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

In order to arrive at this result, it is assumed that the property in question could have been levied upon and sold under
60 judicial process against the bankrupt, either generally, or because there was no possession in the plaintiff in error, that would make good its claim against creditors of the bankrupt. But this assumption is not warranted. The goods delivered by the contractor upon the premises, for the purpose of being built into the structure contracted for, were sufficiently in the possession of the owner of the premises to protect the lien, claimed as the result of the understanding between the parties to the contract. They were in the possession of the owner of the free-hold as fully as they could be, consistently with the right of the contractor to incorporate them in the building. In this respect, this case differs from those cited by defendant in error, in which the materials furnished by the contractor, and in litigation between the parties, were in the exclusive possession of the contractor, never having been delivered upon the premises of the owner. Materials delivered as in this case, are notoriously to all the world, in the qualified possession and ownership of the owner of the freehold, and the creation of a lien or charge, or the making of a conveyance, would not require, or indeed be susceptible of, any further delivery or change of possession, in order to take the case out of the mischiefs of the statute of frauds.

To merely say that these materials could have been levied on by judgment creditors of the bankrupt, and thus bring them within the description contained in section 70 of the bankrupt law, of property that, upon the adjudication of bankruptcy passed to the trustee of the bankrupt, is begging the question. These materials would not, in our opinion, after their delivery on the premises by

the contractor, have been liable to such a seizure, for the reasons that we have already stated.

61 The situation of the parties, as the result of the contract between them, was such, that the contractor could have made no disposition of this property, inconsistent with his obligations under the contract, and he could have been prevented in equity, by injunction, from so doing; and equally so could a creditor have been prevented from asserting a right of seizure inconsistent with the interest of the plaintiff in error. In this respect, we think the case is quite within the *ratio decidendi* of *Hauselt v. Harrison*, 105 U. S. 401, 407. The trustee in bankruptcy, seeking by proceeding in law to enforce the title of the bankrupt, to personal property so situated, will be subject to all legal and equitable claims of others, which exist against the bankrupt, not in fraud of the bankrupt law or the rights of general creditors.

Hauselt *v.* Harrison (*supra*)
Cook *v.* Tullis, 18 Wall. 341.
Yeatman *v.* Sav. Inst. 95 U. S. 764.
Stewart *v.* Platt, 101 U. S. 739.
So. Branch Lumber Co. *v.* Ott, 102 U. S. 622.
Chattanooga Nat'l Bank *v.* Rome Iron Co. 102 F. R. 755.

The law of the contract, as we view it, supports the claim of plaintiff in error, that the right of the owner was a specific contractual right conferred upon it by the original agreement between the parties, and that the subsequent action of the owner in acceding to the request of the contractor for an advance of $15,000, upon the faith of the materials delivered upon the ground, confirmed and made certain the right of the owner upon the subsequent default of the contractor, to enforce the original contractual right and, to apply the materials to the use to which they had been specifically

62 appropriated by the contractor, in delivering them on to the premises of the owner for use in fulfilling the contract.

We disagree, also, with the position taken by the learned judge of the court below, in regard to the effect of the oral agreement of December 16th, when he says:—"Even assuming, however, that a contract of pledge was actually made, it would be ineffective, because no possession was ever taken by the silk company under the contract, and therefore if under such circumstances any lien could be said to exist, it would be a secret lien, and, like the privileges reserved under the 5th article, would also be stricken down by the Pennsylvania law in favor of other creditors."

What we have already said, as to the effect of the delivery by the contractor of the materials upon the premises of the silk company, in giving it a possession that would protect the lien which we think was intended to be created by the parties in their general contract, and especially in the 5th article of the supplemental agreement, is applicable to the proposition of the learned judge, just quoted. There is no intimation in the testimony that, if this oral agreement was a distinct and independent pledge, it was not, to use the language of

section 67 (*d*) of the bankrupt act, "given or accepted in good faith, and not in contemplation of or in fraud upon this act and for a present consideration." The only question, then, is the one upon which the court below expressed itself in the opinion just quoted, to wit, that there was no sufficient delivery or change of possession, to deprive the transaction of the character of a secret lien, as denounced by the law of Pennsylvania in that behalf, in favor of attaching creditors, and therefore of the trustee in bankruptcy. The intention to pledge being clear, and the consideration being substantial and adequate, what
63 other act was necessary, to give the requisite possession to avoid the mischiefs aimed at by the law of Pennsylvania, as founded on the statute of Elizabeth? The materials were already on the land and premises of the company, for the purpose of being incorporated into the building. Could that possession, in pursuance of the pledge, be made more notorious and open by moving them away and bringing them back, or by removing them to other land of the silk company? We think not. Goods pledged or conveyed, while so situated, are within none of the mischiefs of the statute of frauds, and can be the occasion of no deception to a creditor of the contractor, any more than if fully incorporated into the building, in which case, no assertion of a right in a creditor to attach is suggested.

On the whole case, therefore, we think the learned judge of the court below erred in not granting defendant's motion for judgment, notwithstanding the verdict. The judgment below is therefore reversed, with directions to enter one in favor of the defendant.

(Endorsed:) Duplan Silk Company, plaintiff in error, *v.* W. H. Spencer, trustee in bankruptcy etc., Opinion of the court by Gray, circuit judge. Filed May 7, 1902.

64 In the United States Circuit Court of Appeals for the Third Circuit.

DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of New York, Plaintiff in Error,
vs.
W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Defendant in Error.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof; it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, be, and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to the said circuit court with directions to enter judgment in favor of the defendant.

GEO. M. DALLAS, *Cir. Judge.*

Philadelphia, May 9, 1902.

(Endorsed:) No. 10 March term 1902, Order reversing judgment of lower court, with directions to enter judgment for defendant. Entered and filed May 9, 1902.

65 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1902.

DUPLAN SILK COMPANY, Plaintiff in Error,
vs.
W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennet- and Rothrock, Defendant in Error. } No. 10.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

And now to-wit: this sixth day of June A. D. 1902, it is ordered that mandate issue to the said circuit court of the United States, for the eastern district of Pennsylvania in accordance with the opinion and judgment of this court in said cause.

GEO. M. DALLAS, *Cir. Judge.*

(Endorsed:) No. 10 March term 1902, Order for mandate to issue. Entered and filed June 6. 1902.

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

[Seal United States Circuit Court of Appeals, Third Circuit.]

Whereas, lately in the circuit court of the United States for the eastern district of Pennsylvania, before you, or some of you, in a cause between Duplan Silk Company a corporation organized and existing under the laws of New York, plaintiff in error, against W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, defendant in error, wherein the verdict of the jury and judgment of the said circuit court entered in said cause is in the following words, viz:

"And the jurors aforesaid upon there oaths and affirmations respectively do say that they find for plaintiff and assess the damages at twelve thousand one hundred and eighty-three 00/100 dollars.

1902 January 18.—Præcipe for judgment filed. Judgment accordingly.

67 as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the third circuit by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

68 And whereas, in the present term of March, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, be, and the same is hereby reversed with costs, and that the said defendant, The Duplan Silk Company, recover against the said plaintiff, W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett and Rothrock, one hundred and four dollars and twenty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be remanded to the said circuit court with directions to enter judgment in favor of the defendant.

Philadelphia, May 9. 1902.

69 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixth day of June, in the year of our Lord one thousand nine hundred and two.

Costs of Duplan Silk Co.

Clerk	$19.25
Printing record	65.00
Attorney	20.00
	$104.25

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 10, March term, 1902. Duplan Silk Co. plaintiff in error, *vs.* W. H. Spencer trustee in bankruptcy etc. Mandate.

70 United States Circuit Court of Appeals, Third Circuit, March Term, 1902.

Costs of Duplan Silk Company in No. 10.

1902, March term.—Docketing cause and filing record, $5.00; appearance, .50; filing precipe and receipt, .50; filing papers, $1.00; filing briefs, $5.00; argument, .20; judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; preparing record for printer, etc., $13.00; cost of printing record, $52.00; attorney's docket fee $20.00 costs and copy, .40..... 104 25

Fee Book 3, page 135.

Test:

WM. H. MERRICK,
Clerk Circuit Court of Appeals, 3d Circuit.

71 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1902.

DUPLAN SILK COMPANY, a Corporation Organized and Existing under *under* the Laws of the State of New York, Plaintiff in Error,

vs.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett & Samuel W. Rothrock, Partners as Bennett & Rothrock, Defendant in Error. } No. 10.

In error to the United States circuit court in and for the eastern district of Pennsylvania.

Assignments of Error.

Comes now, the said defendant in error, by his attorney, T. M. B. Hicks, and files the following assignments of error upon which he will rely:

1st. That the United States circuit court of appeals for the third circuit erred in the above entitled cause in entering the judgment of May 7, 1902, reversing the judgment herein of the circuit court of the United States in and for the eastern district of Pennsylvania.

2nd. That the United States circuit court of appeals for the third circuit erred in the above entitled cause in not affirming the judgment of the circuit court of the United States in and for the eastern district of Pennsylvania to which the writ of error in this cause was taken.

T. M. B. HICKS,
Attorney for W. H. Spencer, Trustee, &c., Defendant in Error.

72 & 73 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1902.

DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York, Plaintiff in Error,

vs.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Defendant in Error.

No. 10.

In error to the United States circuit court in and for the eastern district of Pennsylvania.

W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, feeling himself aggrieved by the judgment of the United States circuit court of appeals for the third circuit entered in this cause May 7, 1902, reversing the judgment of the United States circuit court in and for the eastern district of Pennsylvania, comes now by T. M. B. Hicks, his attorney, and, showing that the said cause is not one in which the judgment of the United States circuit court of appeals is made final and that the amount in controversy in said cause exceeds one thousand dollars besides costs, petitions for an order allowing said defendant in error to prosecute a writ of error to the honorable the Supreme Court of the United States, and *and* according to the laws of the United States in that behalf made and provided, for the purpose of reversing the said judgment of the United States circuit court of appeals for the third circuit, and that all further proceedings be suspended and stayed in said cause until the determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray, etc.

Dated this 10th day of June, A. D. 1902.

T. M. B. HICKS,

Attorney for W. H. Spencer, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners, &c., Bankrupts.

June 10/02.

Allowed:

GEORGE SHIRAS, JR.,
Associate Justice of the S. Ct.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Duplan Silk Company, plaintiff in error, and W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, defendant in error, a manifest error hath happened, to the great damage of the said defendant in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of June, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

75 UNITED STATES OF AMERICA, *ss:*

To Duplan Silk Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the third circuit wherein W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, is plaintiff in error and you are defendant in error, to show cause, if

any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 13th day of June, in the year of our Lord one thousand nine hundred and two.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

76 On this eighteenth day of June, in the year of our Lord one thousand nine hundred and two, personally appeared Russell T. Boswell, before me, the subscriber, a notary public for the State of Pennsylvania residing in the city of Philadelphia under commission expiring Jan'y 5, 1905 and makes oath that he delivered a true copy of the within citation to William J. Turner, attorney of record for the Duplan Silk Company, at his office, 929 Chestnut street, Philadelphia, Pa., on June 18th, 1902, at 2 o'clock p. m.

RUSSELL T. BOSWELL.

Sworn to and subscribed the 18" day of June, A. D. 1902.

[Seal of Chas. Cobb Van Riper, Notary Public, Philada., Pa.]

CHAS. COBB VAN RIPER,
Notary Public.

77 UNITED STATES OF AMERICA, ss:

To Duplan Silk Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the third circuit wherein W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 13th day of June, in the year of our Lord one thousand nine hundred and two.

(Signed) GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

78 We hereby accept service of the within citation, and direct the clerk of the Supreme Court of the United States to enter

our appearance for The Duplan Silk Company, the defendant in error therein named.

RICHARD C. DALE,
752 *Bullitt Bldg., Philadelphia, Pa.*
WM. JAY TURNER,
929 *Chestnut St., Philada., Pa.*

79 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing pages from one to seventy-six inclusive to contain a full, true, complete and faithful copy of the original transcript of record in the case of W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, plaintiff in error, against Du*l*pan Silk Company, a corporation organized and existing under the laws of the State of New York, defendant in error on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this seventh day of July, in the year of our Lord one thousand nine hundred and two and of the Independence of the United States the one hundred and twenty-seventh.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 18603. U. S. C. C. of appeals, third circuit. Term No. 83. W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett and Rothrock, plaintiff in error, *vs.* Duplan Silk Company. Filed July 12th, 1902.

SUPREME COURT of the U[illegible]

October Term, 1[illegible] No. [illegible]

W. H. SPENCER, Trustee in Bankruptcy of
of JAMES V. BENNETT and [illegible]
ROTHROCK, partners as Bennett & [illegible]
Plaintiff in Error,

vs.

DUPLAN SILK COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

THOMAS M. S. HICKS,
WILLIAM H. SPENCER,
CLARENCE L. PEARSON,
For Plaintiff in Error.

Supreme Court of the United States

October Term, 1903. No. 83.

W. H. SPENCER, Trustee in Bankruptcy of the estate of JAMES V. BENNETT and SAMUEL W. ROTHROCK, partners as BENNETT & ROTHROCK, *Plaintiff in Error*,

vs.

DUPLAN SILK COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PLAINTIFF IN ERROR.

Abstract or Statement of the Case.

This was an action of trover and conversion (under the Pennsylvania practice act of 1887* called an action of trespass), originally brought in the Court of Common Pleas of Lehigh County, Pennsylvania, by the plaintiff in error as trustee

*The act of assembly of the Commonwealth of Pennsylvania, approved May 25, 1887, Pennsylvania Pamphlet Laws, 1887, page 271, provides, *inter alia*:

"SECTION 2. That so far as relates to procedure, the distinctions heretofore existing between actions *ex delicto* be abolished, and that all damages, heretofore recoverable in trespass, trover or trespass on the case, shall hereafter be sued for and recovered in one form of action to be called an 'action of trespass.'

"SECTION 3 The plaintiff's declaration in each of the said actions, namely, the action of assumpsit and the action of trespass, shall consist of a concise statement of the plaintiff's demand as provided by the fifth

in bankruptcy of the estate of Bennett & Rothrock, bankrupts, who were contractors and builders, to recover in damages for the conversion by the Duplan Silk Company, the defendant in error, of certain tools and building materials which were the property of said bankrupts.

The Duplan Silk Company, the defendant in error, a New York corporation, thereupon removed the suit into the Circuit Court of the United States for the Eastern District of Pennsylvania, upon the ground of the diverse citizenship of the parties.

Four distinct Federal questions, to wit: The construction to be applied to four separate clauses of the act of the Congress of the United States, entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, commonly known as the Bankrupt Act, were involved in the case, and upon them the decision of the case in each of the courts below turned.

In the Circuit Court of the United States for the Eastern District of Pennslyvania there was a verdict for the plaintiff in error in the sum of $12,183, subject to the point reserved by the court in the charge to the jury whether under all the evidence the plaintiff was entitled to recover. The court entered judgment for the plaintiff in error upon the verdict. From this judg-

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section of the act of the 21st day of March, Anno Domini one thousand eight hundred and six, which, in the action of assumpsit, shall be accompanied by copies of all notes, contracts, (&c.) . . . The statement shall be signed by the plaintiff or his attorney, and in the action of assumpsit shall be replied to by affidavit.

. . . . . .

"SECTION 7. Special pleading is hereby abolished. . . . The only plea in the action of trespass shall be not guilty. . . . The pleadings in all courts to be subject to the rules of the respective courts as to notice of special matter.

"SECTION 8. The true intent and meaning of this act is that it applies only to the present actions of assumpsit, debt, covenant, trespass, trover and case, and that all other actions now existing shall remain as heretofore and are in no way affected by the passage of this act; and that, as to the actions herein recited, it applies to the procedure only, and the legal rights of the parties are not in any way to be affected thereby."

ment, the defendant in error took a writ of error to the United States Circuit Court of Appeals for the Third Circuit, which reversed the judgment of the United States circuit court for the Eastern District of Pennsylvania, and directed that judgment should be entered therein for the defendant, the Duplan Silk Company, *non obstante veredicto.*

From this judgment of the United States Circuit Court of Appeals for the Third Circuit, the plaintiff in error sued out this writ of error from the Supreme Court of the United States.

The Facts Shown in the Record,

and giving rise to the questions of law involved, are as follows:

Bennett & Rothrock, some months before their bankruptcy, agreed in writing with the Duplan Silk Company to furnish the materials for and erect a silk mill for said company, at Hazleton, Pa.; and on January 13, 1900, when they were adjudged bankrupts, had progressed with the building operations and had a large quantity of tools and materials near the site of the mill, to be used in its erection. These tools and materials were the absolute property of Bennett & Rothrock, having been bought with their money, or on their credit, and delivered to them without conditions. Bennett & Rothrock were on January 13, 1900, on their own petition, adjudged bankrupts by the District Court of the United States for the Western Distirct of Pennsylvania; and W. H. Spencer, the plaintiff in error, having been elected by the creditors trustee of their bankrupt estate, demanded delivery of said tools and materials from the Duplan Silk Company, which had taken possession of them. This demand was refused, the said company converting the said chattels to its own use by using them to complete said mill.

The facts involved, and the value of the tools and materials in question, are not in dispute.

The written contract for the erection of the mill, dated Au-

gust 30, 1899, was recorded on September 2, 1899, before the building operations began, in the office of the Prothonotary of Luzerne county, Pennsylvania, within which Hazleton lies, and contained an express covenant against the filing of mechanics' liens by material men, sub-contractors or others. The said contract was as follows:

This Agreement, made and concluded the 30th day of August, A. D. one thousand eight hundred and ninety-nine, by and between Bennett & Rothrock of the City of Williamsport, County of Lycoming, and State of Pennsylvania., of the first part, and the Duplan Silk Company of the City of New York, State of New York, through E. J. Lipps, their representative, of the second part,

Witnesseth, That the said party of the first part for and in consideration of the sum of money hereinafter mentioned, to be paid by the said party of the second part, as well as the covenants and agreements hereinafter recited by the said party of the second part to be kept and performed, doth by these presents covenant, promise and agree to and with the said party of the second part, as follows to wit:

That he, the said party of the first part, shall and will in a good and workmanlike manner, according to the best of his art, skill and ability, build and erect, finish and complete, and the materials for the same wholly provide as called for in the plans and specifications, the following described buildings:

One main building 212 feet x 286 one-story sawtooth roof; one dye house 50 x 75; one addition, such as lunch rooms, store room and carpenter shop; one pump house; one engine room and basement; one boiler house; one coal vault; a system of heat conduits and flues; one cistern; one tank, etc., etc., all of which are duly set forth on plans and specifications.

The whole of said work to be performed and all of said meterials furnished in conformity with the plans and specifications elevations and detail drawings of the same, as made by Wm. Steele & Sons, architects, hereby appointed by the party of the second part, which plans and specifications bear even date herewith and are marked by the initials of the parties hereto, and which are to be considered as forming part of this agreement as if herein fully set forth.

The said party of the first part agrees that the work aforesaid shall be commenced and diligently prosecuted, and the mater-

ials promptly furnished, and the said buildings shall be wholly completed according to the terms of this contract and ready for use and occupancy on or before January 1st, 1900, and that for each and every day the same remains uncompleted, after said date, the said party of the first part, shall and will forfeit the sum of 25 dollars per day, unto the said party of the second part, which said sum shall be taken and considered by both parties as liquidated damages and which shall be deducted and retained by the said party of the second part from out of the final payment to be made unto the party of the first part under these articles, and that no change in the date of the completion of the buildings provided for shall make any alteration in this forfeiture, unless such change of date for the completion of the work shall be agreed to in writing by the parties to this agreement.

And it is further understood and expressly agreed, that if any changes or alterations are made in the plans or specifications, or in the work, or in the materials in regard to the buildings or improvements provided for in these articles of agreement. that such changes, of whatsoever character the same may be, shall be agreed upon by the parties hereto in writing before such alterations in any manner whatsoever are executed, and if so agreed upon, the value of such changes or differences shall be added to the amount to be paid under this agreement or deducted therefrom as the case may be.

And it is expressly agreed and understood by the party of the first part that if he without such written agreement in regard to the alteration of the plans or specifications, or of the materials furnished in the prosecution of the said work, shall make any changes whatsoever, that he the said party of the first part does the same at his own risk and at his own expense, and that no verbal acquiescence or consent or mere non-interference on the part of the party of the second part shall be considered as an acceptance by it of such change in the plans or specifications, or any change in the construction or materials whatsoever.

And it is further expressly understood and agreed by the parties of the first part that no extra work shall be performed or extra material furnished by the said parties of the first part, unless thereto authorized in writing by the party of the second part and by agreement as hereinbefore specified, but that the party of the second part may from time to time make such

changes or alterations in aforesaid plans and specifications, materials and so forth in manner before provided and in no other manner.

And it is also expressly agreed and understood that any changes or alterations in aforesaid plans and specifications, material and so forth, will in no wise alter or affect the date of completion of the aforesaid buildings, or the amount of fine per diem for the non-completion of said buildings in the above specifications, unless otherwise specifically agreed upon in writing and signed by the parties of this agreement.

It is hereby mutually agreed between the parties hereto that the sum to be paid by the party of the second part (owner) to the party of the first part (contractor) for the said work and material shall be seventy-six thousand dollars ($76,000.00), subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds in installments as follows:

When all excavations are made, all foundation walls and piers completed	$5,000 00
When all brick walls are completed	$10,000 00
When all roofs and glass sky-lights are put on	$10,000 00
When all floors are laid	$10,000 00
When the buildings are completed and ready for occupancy	$10,000 00
20 days later	$10,000 00
40 days later	$10,000 00
60 days later, balance	$11,000 00

From this last amount all deductions in accordance with the terms of this agreement, arising from forfeits or otherwise, are to be made; or there is to be added any allowances for changes or additional work as agreed upon.

If the total amount thus to be deducted should exceed the amount of this payment, then the preceeding installment is to wholly or partially withheld.

And it is further hereby agreed that the said Contractor shall cause all liens to be fully and absolutely settled, cancelled and discharged without loss, expense or damage to said owner, and without any delay in the progress of said work aforesaid; and so deliver over to said owner the same free from all claims and demands whatsoever.

And it is hereby especially stipulated, covenanted and agreed

that no material-man, or any person other that the Contractor, the aforesaid Bennett & Rothrock, shall have any right to file or maintain any mechanic's lien for work done or materials furnished to the aforesaid building; and any right to file such lien is hereby expressly waived.

Witness our hands and seals the day and year first above written.

BENNETT & ROTHROCK. (Seal)
DUPLAN SILK COMPANY.
E. J. LIPPS, (Seal)

Witness present:
JEAN ALTERN,
MAME RHOAD.

It also transpired at the trial in the Circuit Court below, by the testimony of Emory J. Lipps (printed record, pages 27-34), a witness for the defendant in error, that a separate, supplementary contract between the bankrupts and the defendant in error, unknown to anyone else and never recorded, was executed at the same time with the above contract, and was as follows:

This Agreement, made the thirtieth day of August, in the year one thousand eight hundred and ninety-nine, by and between Bennett & Rothrock, of Williamsport, State of Pennsylvania, party of the first part (hereinafter designated the Contractor), and Duplan Silk Company, of the City of New York, State of New York, through E. J. Lipps, their representative and general manager, party of the second part (hereinafter designated the Owner);

Witnesseth, That the Contractor, in consideration of the fulfillment of the agreements herein made by the Owner, agrees with the said Owner, as follows:

Article I. The Contractor under the direction and to the satisfaction of Wm. Steele & Son, architects, and E. J. Lipps, general manager, acting for the purposes of this contract as agents of the said owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architects for the erection of a Silk Mill at Hazleton, Pennsylvania, consisting of:

One main building 212 feet x 286 one-story saw tooth roof; one dye house 50 x 75; one addition used as lunch room, store room and carpenter shop; one pump house; one engine room and basement; one boiler house; one coal vault; a system of heat conduits and flues; one cistern; one tank, etc., etc.,

all of which are duly set forth on plans and specifications, which drawings and specifications are identified by the signatures of the parties hereto.

Article II. The architects shall furnish to the Contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the Contractor shall conform to the same as part of this contract so far as they may be consistent with the original drawings and specifications referred to and identified, as provided in Article I.

It is mutually understood and agreed that all drawings and specifications are and remain the property of the architects.

Article III. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

Article IV. The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architects or their authorized representatives. He shall, within thirty-four hours after receiving written notice from the architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the architects shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

Article V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled orkmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the Owner shall be at liberty, after days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereaf-

ter to become due to the Contractor under this contract; and if the architect shall certify that such refusal neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor, but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties.

Article VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated January the first nineteen hundred; provided that

Article VII. Should the Contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the Owner, or the architects, or of any other contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employes through no default of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architects within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the architects, but appeal from their decision may be made to arbitration, as provided in Article III of this contract.

Article VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of

failure so to do, thereby causing loss to the Contractor for such loss; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), then he shall make good to the Owner any such damages. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the architects or by arbitration, as provided in Article III of this contract.

Article IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be seventy-six thousand dollars subject to additions and deductions as hereinbefore provided and also by special agreement between the two contracting parties bearing even date, and that such sum shall be paid in current funds by the Owner to the Contractor in installments, as follows:

Excavations are made, all foundation walls and piers completed	$5,000 00
When all brick walls completed	$10,000 00
When the roofs and glass sky-lights are completed	$10,000 00
When all floors are laid	$10,000 00
When ready for occupancy	$10,000 00
20 days later	$10,000 00
40 days later	$10,000 00
60 days later, balance	$11,000 00
	$76,000 00

The final payment shall be made within sixty days after this contract is filled.

All payments shall be made upon written certificates of the architects to the effect that such payments have become due.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner or the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharing any lien on said premises made obligatory in consequence of the Contractor's default.

Article X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article XI. The Owner shall during the progress of the work maintain full insurance on said work, in his own name and in the name of the Contractor, against loss or damage by fire. The policies shall cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto, as their interest may appear. The premium on said insurance to be paid one-half by the Owner, the other half by the Contractors.

Article XII. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

BENNETT & ROTHROCK, (Seal)
DUPLAN SILK CO.
E. J. LIPPS, Mgr., (Seal)

In presence of
JEAN ALTHERN,
MAME RHOAD.

E. J. Lipps is named in this contract as general manager of the Duplan Silk Company, and William Steel & Sons as the architects of the building.

On January 11 Mr. Lipps, whose office was in South Bethlehem, some miles distant from Hazleton, addressed the following letter to the Duplan Silk Company:

"South Bethlehem, Jan. 11, 1900.

DUNLAP SILK COMPANY, New York City, N. Y.

I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company, building in course of construction at Hazleton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with

said Duplan Silk Company under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided therein. E. J. LIPPS."

This letter states that Mr. Lipps was acting as "overseer and contractor for the architects for the Duplan Silk Company building in course of construction at Hazleton, Pa.:" but there is no evidencce that he had any such authority to act for the architects. He himself did not so testify, nor were the architects called to corroborate the allegation contained in the letter; while the contract declares him to be, what in truth he was, the general manager of the silk company, and one of its agents for the purposes of the contract. The letter just quoted was delivered by Mr. Lipps to himself as the general manager of the silk company, and thereupon, acting now as the Duplan Silk Company, he wrote and mailed to Bennett & Rothrock, upon the same day, the following letter:

"South Bethlehem, Jan. 11, 1900.

MESSRS. BENNETT & ROTHROCK, Williamsport, Pa.

Dear Sirs:—Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazleton.

Yours truly,

DUPLAN SILK COMPANY."

This letter was enclosed with a communication also written by Mr. Lipps, the "notification" referred to therein being the first of the letters just quoted:

"South Bethlehem, Jan. 11, 1900.

MESSRS. BENNETT & ROTHROCK, Williamsport, Pa.

Gentlemen:—We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill building at Hazleton, Pa., according to our contract, dated August 30th, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on Monday, January 15, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein. Yours truly

DUPLAN SILK COMPANY.

E. J. Lipps, General Manager."

Some days after these communications had been written and sent, Mr. Lipps came to Philadelphia, where the architects lived, and obtained from them the following paper:

"Philadelphia, Jan 11, 1900.

Whereas we are informed by E. J. Lipps, general manager for Duplan Silk Company, and who has been in charge of the construction of a certain building in Hazleton, Pa., which has been in the course of erection under a contract entered into between Duplan Silk Company and Bennett & Rothrock, contractors, that the contractors in violation of their said contract have since January 6th, abandoned work upon the said contract, and that he has notified the contractors of the intention of the Duplan Silk Company to terminate the employment of the contractors and to complete the operation, we hereby certify our approval of said action and declare that the neglect and failure of the contractors was sufficient ground for the same.

WM. STEELE & SONS."

Pursuant to these notices, the Duplan Silk Company entered upon the premises, and on January 15 took possession of the tools and materials heretofore referred to, this being two days after the title of the bankrupts had passed by operation of law to the trustee.

These tools and materials were scheduled in the bankruptcy court among the assets of said bankrupts; and there were numerous judgments against said bankrupts in the state courts and executions out against them when they were adjudged bankrupts.

The Circuit Court below, in construing these contracts, held, that the certificate of the architects, required by the 5th section of the contract, was a condition precedent to the right of the owner to move for the forfeiture of the tools and materials, and should have preceded instead of following the action of the owner, and should then have been based on the own knowledge of the architects and not solely upon allegations made to them by the owners; that the notice sent by the owner to the contractors did not express any intention of taking possession of the tools and materials; and that, in any view, the title of the trus-

tee in bankruptcy, to the tools and materials, vested and became absolute on January 13, two days before the silk company took possession of them.

It was also testified on the trial that in December, 1900, the contractors applied to the silk company for an advance of money, and that the company advanced them $15,000, more than the contract required, believing—so it was testified by Lipps—that the material upon the ground was sufficient security for this sum. It was urged that this transaction was equivalent to a pledge of this material, and therefore that the company was justified in taking possession of it in repayment of the advance.

The Circuit Court below held, however, that, even assuming that a contract of pledge had then been actually made, it was, under the law of Pennsylvania, ineffective as against creditors of the contractors, by reason of the fact that such pledge was not accompanied by a change of the possession of the chattels from the contractors to the silk company.

The Federal Questions Raised in Courts Below.

The Federal questions raised by the plaintiff in error in the courts below, and discussed and decided in his favor by Judge McPherson in the Circuit Court below and against him by the United States Circuit Court of Appeals below, were briefly as follows:

First. Were the tools and building materials in controversy, within the true meaning and intent of the provisions of section 70, paragraph a cl 5, of the act o the Congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, property which prior to the filing of the petition in bankruptcy by the said bankrupts "could have been transferred by them or

which might have been levied upon and sold under judicial process against them," and which as a consequence vested by operation of law in the plaintiff in error as trustee in bankruptcy of the estate of said bankrupts, upon his appointment and qualification as such trustee, as provided by the express language of section 70, paragraph a of the said act of Congress?

Second. Was any transfer of the title to said chattels, from the bankrupts, whether prior or sebsequent to their adjudication as such, to the defendant in error, whether inchoate or complete, and whether worked by any of the provisions of the contract between said parties or by any alleged advancement of money by the defendant in error to said bankrupts, within the true meaning and intent of the provisions of section 70, paragraph a, clause 4, of the said act of Congress, of July 1, 1898, a transfer of said property by said bankrupts in fraud of their creditors, the same not having been accompanied nor followed by a transfer of the possession of said chattels from the bankrupts to the defendant in error, and did title thereto, as a consequence, vest, by virtue of said provisions of said act of Congress, in the plaintiff in error as such trustee?

Third. Was the plaintiff in error entitled to recover, by the true intent and meaning of the provisions of section 70, paragraph e, of the said act of Congress of July 1, 1898, upon the ground that the defendant in error was not a *bona fide* holder of said chattels for value prior to the adjudication in bankruptcy, and that there were numerous judgment creditors of the bankrupts at the time of their adjudication, which creditors might, under the laws of the state of Pennsylvania, have avoided any transfer of said chattels by the said bankrupts to the defendant in error, by reason of such transfer not having been accompanied and followed by a transfer of the possession of the same from the bankrupts to the defendant in error?

Fourth. Inasmuch as any claims of the defendant in error to said chattels, whether arising from the provisions of the contract in evidence between it and the bankrupts, or by reason of any advance of money made by it to the bankrupts, or from any

other cause shown in the evidence, were not valid liens upon said chattels under the laws of the state of Pennsylvania. both for want of record and for want of a change of the possession of said chattels from the bankrupts to the defendant in error, did the plaintiff, in error as trustee, by virtue of the true intent and meaning of the provisions of section 67, paragraph a, of said act of Congress of July 1, 1898, take title to said chattels discharged of all such claims?

Assignments of Error.

First. The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania, and in rendering final judgment against the plaintiff in error herein, it appearing from the record in the proceedings in said cause in the Circuit Court of the United States for the Eastern District of Pennsylvania, that title to the chattels which were the subject of the trover and conversion for which the damages are sought in this cause, vested by operation of law in the plaintiff in error as trustee in bankruptcy of the estate of Bennett & Rothrock, bankrupts, upon his appointment and qualification as such trustee, as averred in the declaration of the plaintiff in error, the said chattels being, within the true meaning and intent of the provisions of section 70, paragraph a, clause 5 of the act of Congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, property which prior to the filing of the petition in bankruptcy by the said bankrupts could have been transferred by them or which might have been levied upon and sold under judicial process against them.

Second. The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the Cir-

cuit Court of the United States for the Eastern District of Pennsylvania and in rendering final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the Circuit Court of the United States for the Eastern District of Pennsylvania, that any transfer of the title to the chattels which were the subject of the trover and conversion for which damages are sought in this cause, from the bankrupts whether prior or subsequent to their adjudication as such to the defendant in error herein, whether inchoate or complete, worked by any of the provisions of the contract between them or by any alleged advancement of money by the said defendant in error to the said bankrupts, was, within the true meaning and intent of the provisions of section 70, paragraph a, clause 4, of the act of the Congress of the United States, entitled "An act to establish a uniform system of bankrupt throughout the United States," approved July 1, 1898, a transfer of said property by the said bankrupts in fraud of their creditors, the same not having been accompanied nor followed by a transfer of the possession of said chattels from the bankrupts to the said defendants in error, and that by reason thereof title thereto vested, by virtue of said provisions of the said act of Congress, as averred in the declaration, in the plaintiff in error as trustee of the estate of said bankrupts upon his appointment and qualification as such.

Third. The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the Circuit Court of the United States for the Eastern District of Pennsylvania that there were numerous judgment creditors of said bankrupts at the time of their adjudication as such, and that any transfer by the said bankrupts to the defendant in error, whether prior or subsequent to their adjudication as bankrupts, of the chattels

which were the subject of the trover and conversion for which damages are sought in this cause, was not accompanied nor followed by a transfer of the possession of the same from the said bankrupts to the said defendant in error, and might, under the laws of the state of Pennsylvania, have been avoided by the judgment creditors of the said bankrupts; and, the defendant in error not being a bona fide holder of said chattels for value prior to the date of the adjudication of bankruptcy against said bankrupts, that such transfer, so far as any had been made, was, by virtue of the express provisions of section 70, paragraph e, of the act of the Congress of the United States, entitled "An act to establish a uniform system of bankrupty throughout the United States." approved July 1, 1898, avoided by the plaintiff in error as trustee of the estate of said bankrupts, by reason whereof and of said provisions of said act of Congress the plaintiff in error was entitled in this cause to recover the said chattels or the value thereof from the defendant in error.

Fourth. The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the Circuit Court of the United States for the Eastern District of Pennsylvania, that the bankrupts were the absolute owners of the chattels which were the subject of the trover and conversion for which damages are sought in this cause, and that any claims of the defendant in error arising either from the provisions of the contract in evidence between it and the bankrupts, or by reason of any advance of money made by it to the said bankrupts, or from any other cause shown by the evidence, not being valid liens under the laws of the state of Pennsylvania, both for want of record and for want of a change of the possession of said chattels from the the bankrupts to the defendant in error, were, by reason of the

provisions of section 67, paragraph a, of the act of the Congress of the United States, entitled "An act to establish a uniform system of bankrupt throughout the United States," approved July 1, 1898, not liens upon said chattels, by reason whereof title to the same vested in the plaintiff in error as trustee of the estate of said bankrupts, as averred in the declaration, immediately upon his appointment and qualification as such.

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I.

Upon the motion to dismiss this Writ of Error.

We respectfully contend that this Writ of Error is of right, upon the following grounds:

First. That the jurisdiction of the United States Circuit Court for the Eastern District of Pennsylvania was not dependent entirely upon the opposite parties to the suit being citizens of different states, but was also dependent upon the fact that the suit arose under the laws of the United States.

Second. That the right to this Writ of Error is expressly conferred by section 25, paragraph b and clause 1, of the act of Congress of July 1, 1898, entitled, "An act to establish a uniform system of bankruptcy throughout the United States,"

And

Third. That the Supreme Court of the United States, even if of opinion that this Writ of Error was not of right, may, because of the importance of the questions involved, treat the same as a certiorari.

FIRST. The act of Congress of March 3, 1891, creating the Circuit Court of Appeals, provides in Section 6, (26 U. S. Stats. 828, Sec. 6, cl. 1), that the judgment of the Circuit Courts of Appeals shall be final in certain classes of cases only, and these classes are clearly defined. They are six in number as follows:

1. When the jurisdiction depends entirely upon the fact that the controversy is between aliens and citizens.
2. When it depends entirely upon the parties being citizens of different states.
3. In cases arising under the Patent Laws.
4. In cases arising under the Revenue Laws.
5. In Criminal Cases.
6. In Admiralty Cases.

Clause 3 of the same section of said statute expressly provides that in all other cases decided by the Circuit Courts of Appeals, there shall be of right an appeal or writ of error to the Supreme Court of the United States.

The case at Bar does not fall within either of the six classes of cases in which the judgment of the Circuit Courts of Ap-

peals is made final, unless it come within the second class, that in which the jurisdiction depends entirely upon the diverse citizenship of the parties. We contend that the jurisdiction in this case also depended upon the fact that the suit was one arising under the laws of the United States.

1st. By Section 2 of Article III of the Constitution of the United States, it is provided that the Federal jurisdiction shall extend, among other thing, to "all cases in law and equity arising under . . . . . the laws of the United States."

To give effect to the provisions of the Constitution quoted, numerous acts of Congress have been passed from time to time, erecting various Federal Courts of inferior jurisdiction, and conferring upon them authority to hear and determine controversies of various classes; beginning with the General Judicature Act of 1789. and coming down to the act of August 13, 1888, which corrected the act of March 3, 1887. and amended the act of March 3, 1875. By the act of August 13, 1888, (Revised Statutes, section 629), it is provided, *inter alia*, "That the Circuit Courts of the United States shall have original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000 00, and arising under the Constitution or laws of the United States."

It has been repeatedly held, that where a right is claimed by the plaintiff in a case, which depends for its existence upon the construction to be given to a law of Congress, a Federal question is involved, and the case arises under the laws of the United States, thus conferring jurisdiction upon the Circuit Courts of the United States under the above quoted provisions of the Constitution and of the Judicature Acts of Congress.

In *Cooke v. Avery, (1892), 147 U. S. 375*, the right of the plaintiff to recover was based upon the construction to be given to Section 916 of the Revised Statutes of the United States in relation to the rights of judgment creditors, and the Supreme

Court, speaking by Mr. Chief Justice FULLER, said, on page 384:

"Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution, or of a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States. Osborne v Bank of United States, 9 Wheaton 738; Starin v. New York, 115 U. S. 248-257."

So in *Pope v. Louisville & New Albany Railroad Company, (1898). 173 U. S. 573,* the Supreme Court, again speaking by Mr. Chief Justice FULLER, distinguishes between rights of action which are merely based on Federal authority such as that belonging to a railroad receiver appointed by a Federal Court, and rights depending upon the correct interpretation of Federal Statutes, holding that the former involved no Federal question while the latter did.

And in the very recent case of *Northern Pacific Railroad Company v. Soderberg, (1902), 188 U. S. 526,* the Supreme Court, speaking by Mr. Justice BROWN, and in deciding a controversy based on the interpretation to be given to the wording of the Land Grant act of Congress of July 2, 1864, said:

"Motion was made to dismiss this appeal for the reason that, as the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship the decree of the Circuit Court of Appeals is final, under section 6 of the Court of Appeals, act of 1891, as interpreted by decisions of this Court in Colorado Central Mining Company v. Turck, 150 U .S. 138; Borgmeyer v. Idler, 159 U. S. 408, and Press Publishing Company v. Monroe, 164 U. S. 105. But, to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Cour was dependent 'entirely' upon diverse citizenship. That is not the case here. Plaintiff's bill does indeed set up a diversity of citizenship as one ground of jurisdiction, but as it appears that its title rests upon a proper interpretation of the Land Grant Act of 1864 as to the exception of non-mineral lands, there is another ground wholly independent of citizenship under that clause of section

1 of the Act of 1888, 25 St. 433, clothing the Circuit Court with jurisdiction of all civil suits involving over $2,000 and 'arising under the Constitution or laws of the United States.' If the case made by the plaintiff be one which depends upon the proper construction of the act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. Doolan v. Carr, 125 U. S. 613; Cooke v. Avery, 147 U. S. 375. . . . . the motion to dismiss must therefore be denied."

Said Mr. Chief Justice MARSHALL in the leading case of *Osborne v. United States Bank (1824), 9 Wheaton 738*:

"A case may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under their construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases which depend on the character of the cause."

In *Railroad Company v. Mississippi, (1880), 102 U. S. 135*, the state of Mississippi sought to compel a railroad company to remove a stationary bridge over a navigable stream on the line between Louisiana and Mississippi. The railroad company claimed that by act of Congress of March 2, 1868, 15, St. 38, said bridge had become part of a post road for United States mails, and prayed for the removal of the case into the Circuit Court of the United States, under the then operative act of March 3, 1875, conferring jurisdiction on the United States Circuit Courts in cases arising under the Constitution or laws of the United States. The application was denied in the state courts and a writ of error was taken to the Supreme Court of the United States, which said in an opinion by Mr. Justice HARLAN, at page 139:

'While the case raises questions which will involve the con-

struction of state enactments and also perhaps general principles of law not necessarily connected with any Federal question, the suit otherwise represents a real and substantial dispute or controversy which depends altogether upon the construction and effect of an act of Congress. If it be insisted that the claim of the state, as set out in its petition, might possibly be determined by reference alone to state enactments, and without any construction of the act of 1817, the provisions of which are invoked by the state in support of its application for mandamus, the important, and so far as the defense is concerned, the fundamental question would still remain, as to the construction of the act of Congress of March 2, 1868. That act, the company contends, protects the present stationary bridge against all interference whatever, upon the part either of the state or of the courts. In other words, should the court be of the opinion that the law is for the state, if the rights of parties were tested simply by the statutes of Alabama and Mississippi, it could not evade, but must meet and determine, the question distinctly raised by the answer, as to the operation and effect of the act of Congress of 1868 * * * * * That a case in law or equity consists of the right of one party, as well as of the other and may properly be said to arise under the Constitution or law of the United States, whenever its correct decision depends upon the construction of either.

That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection or defense of the party in whole or in part by whom they are asserted.

That except in the cases of which this court is given, by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and, lastly,

That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

The dissenting opinion of Mr. Justice MILLER in that case, it will be observed, is based, not upon any disagreement with the principles or logic of the opinion of the Court, but upon the right of the defendant in a suit originally brought in the state courts to remove it to the Circuit Court of the United States where the Federal question is for the first time made to appear by the defense set up to the suit.

In the leading case of *Tennessee v. Davis, (1879), 100 U. S. 257*, Mr. Justice STRONG, speaking for the court, says:

"A case consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection or defense of the party in whole or in part by whom they are asserted. Story on Constitution, section 1647; 6 Wheaton 379."

See Van Alen vs. R. R. Co. (1880), 3 Fed. 545.
Lowry vs. R. R. Co. (1890), 46 Fed. 83.

So it was held in *St. Paul M. & M. Ry. vs. St. Paul and N. P. R. Co., 1895, 68 Fed. 2*, that if it appears

"From the plaintiff's complaint that in any aspect which the case may assume, the right of recovery may depend upon the construction of Federal statutes, and if the right of recovery, so far as it turns upon the construction of such statutes, is not merely a colorable claim, but rests on a reasonable foundation, a Federal question is involved which is adequate to confer a jurisdiction, although the right of recovery is also predicated upon other grounds not involving Federal questions and although the case is ultimately decided upon grounds not involving the determination of any Federal question."

"A suit arises under a law of the United States when the controversy involved therein turns upon the existence, effect, or operation of such a law, and therefore a suit by a riparian owner to enjoin the construction of a bridge contiguous and injurious to his property upon the ground that the defendant is not authorized to build the same by a certain act of Congress, as it pretends and claims, arises under the said act, and is within the jurisdiction of the proper Circuit Court."

Syllabus in Hughes vs. N. P. R. Co. (1883), 18 Fed. 106.
See also Crescent City Live Stock Co. vs. The Butchers' Union Live Stock Co. (1882), 12 Fed. 225.
Also Hodgson vs. Millward, (1863), 3 Grant's Cases, 418.
Ellis vs. Norton, (1883), 16 Fed. 4.

An inspection of the declaration or statement of claim, filed by the plaintiff in error in the Court of Common Pleas of Lehigh County, Pennsylvania, shows that the suit is one arising under a law of the United States, and that the right for whose vindication the suit was brought depended on the construction of said law, within the jurisdictional requirements established by the decisions of this court.

This rule is thus stated in the case of the *Western Union Telegraph Company v. Ann Arbor Railroad Company, 178, U. S. 239*, in which this court say per Mr. Chief Justice FULLER:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. Little York Gold Washing and Water Company v. Keyes, 96 U. S. 199; Blackburn v. Portland Gold Mining Company, 175 U. S. 571."

This declaration or statement of claim in the suit at bar, (page 5 of the Printed Record), avers:

"That on the 13th day of January, A. D., 1900, under and by virtue of the provisions of the act of Congress of the United States, entitled, 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, were adjudged by the District Court of the United States for the Western District of Pennsylvania to be bankrupts. That on the 27th day of Jan-

uary, A. D. 1900, W. H. Spencer, the plaintiff, was duly appointed the trustee in bankruptcy of the estate of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, and duly qualified as such trustee, and has from that time continued to act, and is now acting duly as such trustee."

After averring the wrongful and illegal taking and conversion by the Duplan Silk Company, the defendant, of the chattels in controversy, the declaration proceeds:

"That the said chattels were on the said 13th day of January, 1900, the property of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, and that by reason of the adjudging of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock to be bankrupts by the said District Court of the United States for the Western District of Pennsylvania on the said 13th day of January, 1900, the said chattels became the property of the bankrupt estate of the said bankrupts, and the title in and to the said chattels passed to and vested in W. H. Spencer, the plaintiff, the trustee in bankruptcy of the said estate of the said bankrupts, immediately upon his appointment and qualification as such trustee, as of the date of the adjudging of the said bankrupts to be bankrupt, to wit, as of the 13th day of January, 1900."

It will be observed, in the first place, that the plaintiff in error sues in his fiduciary capacity, by virtue of the authority and office of a trustee in bankruptcy, conferred upon him through the operation of an act of Congress; and that the very existence of his office, the entire scope of its authority, and every element of title set up by him to the chattels in controversy, rest upon the act of Congress of July 1, 1898, known as the Bankrupt Act.

This presents at the outset as complete a Federal question, as that referred to by Mr. Justice BREWER in delivering the opinion of this court in the case of *Shoshone Mining Company v. Rutter, 177 U. S. 505*, in the following language, beginning on page 509:

"As against this we are met by these suggestions: First, that a corporation created by Congress has a right to invoke

the jurisdiction of the Federal Courts in respect to any litigation which it may have, except as specifically restricted by some act of Congress. Osborne v. Bank of United States, 9 Wheaton, 738; Pacific Railroad removal cases, 115 U. S. 1. The argument of Chief Justice Marshall in support of this was, briefly, that a corporation has no powers and can incur no obligations except as authorized or provided for in its charter. Its power to do any act which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter is given by one of the laws of the United States, there is the primary question of the extent and meaning of that law. In other words, as to their act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined, a suit by or against the corporation is one which involves a construction of the terms of its charter. In other words, a question arising under the law of Congress."

This is equally true of the trustee in bankruptcy. His power to do any act which he assumes to do, and his liability to any obligation which is sought to be cast upon him, involves the primary question of the extent and meaning of the law of Congress; and especially is the extent and meaning of that law necessarily involved in the title to property sought to be vindicated in this suit.

It is true that the particular sections and provisions of the said act of Congress upon which the plaintiff bases his right to recover are not specifically referred to and quoted in the declaration. The plaintiff could not certainly know what defense would be set up by the defendant; and to have averred in the declaration that although the defendant claimed title to the chattels in question by virtue of certain written contracts and alleged transfers of the chattels to it by the bankrupts, yet the plaintiff was entitled to recover by reason of certain specified and quoted provisions of said act of Congress rendering such claims void or voidable as against the trustee in bankruptcy—would have added nothing to the jurisdictional force of the averments actually made in the declaration. The short plea of not guilty, the only record answer which the defendant made

or was required to make, would not disclose that its defense would call in question the construction of these particular clauses of the act of Congress, nor would the fact that such was the defense be certainly known until the actual trial of the case. As was said by Mr. Justice SHIRAS in delivering the opinion of this court in the case of *Florida Central and Peninsula Railroad Company v. Bell, 176, U. S. 321,* and as supported by a long line of decisions cited in his opinion:

"It has been several times held by this Court that the plaintiff if the statement of his own claim does not disclose a Federal question, cannot create jurisdiction in a Circuit Court by anticipating the defendant's claim, and by alleging that the defendant will set up a defense under some law of the United States."

What the plaintiff in error did aver in his declaration. after setting up the act of Congress under whose provisions he claimed the right to bring the suit and recover the damages alleged from the defendant, was:

"That by reason of the adjudging of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, to be bankrupts by the said District Court of the United States for the Western District of Pennsylvania on the said 13th day of January, 1900, the said chattels became the property of the bankrupt estate of the said bankrupts, and the title in and to the said chattels passed to and vested in W. H. Spencer. the plaintiff, the trustee in bankruptcy of the said estate of the said bankrupts, immediately upon his appointment and qualification as such trustee, as of the date of the adjudging of the said bankrupts to be bankrupt, to wit, as of the 13th day of January, 1900."

Within these words quoted from the declaration is embraced the whole of the controversy of the suit. Every question raised and decided in the lower courts, and every question upon which this Court must pass to decide the controversy in suit, is raised by these express averments of the declaration. Every such question turns upon a disputed contruction of some provision of said act of Congress. That such is the case, and that the suit is one which does really and substantially involve a dis-

pute or controversy as to a right which depends on the construction or application of this law of the United States, we respectfully insist that the declaration makes to appear, in legal and logical form, such as is required by good pleading.

If such is the case, then the circumstance that there may also come in question other principles or matters unconnected with the Federal law, does not interfere with the jurisdiction, as pointed out by Mr. Chief Justice MARSHALL in *Osborne v. United States Bank, 9 Wheaton 738*, cited *supra.*

2nd. It is true, that the sole ground set up by the defendant in error in its petition for the removal of the suit from the state court to the Circuit Court of the United States, was the diverse citizenship of the parties. This petition, however, was filed in the state court, and the jurisdiction of the Circuit Court of the United States did not attach, until the filing in that court of the record of the proceedings in the state court. Whatever grounds of Federal jurisdiction were shown in that record, which included the declaration filed by the plaintiff in error, thus appeared upon the records of the Circuit Court of the United States at the time its jurisdiction attached

The Supreme Court of the United States have repeatedly ruled, that although the fact of diverse citizenship may have been the only jurisdictional ground, expressly invoked, yet that if the existence of a Federal question appears on the record at the time the jurisdiction of the Circuit Court of the United States attaches, both grounds of jurisdiction actually exist and appear upon the record, and the judgment of the Circuit Courts of Appeals is not final.

In the recent case of *Northern Pacific Railroad Company v. Soderberg, (1902), 188 U. S. 256*, an appeal from the Circuit Court of Appeals, motion was made to dismiss the appeal on the ground that the jurisdiction of the Circuit Court was invoked upon the sole ground of diverse citizenship. This motion was denied, upon the ground that the original jurisdiction was not dependent "entirely" upon diverse citizenship, as it

appeared by the plaintiff's bill that a Federal question was also involved. In the case of *The Union Pacific Railroad Company v. Harris* (*1895*), *158 U. S. 326*, the same situation arose, and this Court say on page 327:

"In the present case jurisdiction was invoked on the ground of diverse citizenship, and it is said that that was the sole ground, and that the reference to the authority under which the corporation was chartered and organized was merely incidental, and, further, that as the case did not involve the validity or construction of the charter of the plaintiff in error, no Federal question arose. . . . . Nevertheless, as the plaintiff below appears to have really proceeded on the ground of diverse citizenship, we think, there was color for the motion to dismiss, although as the other fact upon which jurisdiction could be predicted existed, we are obliged to overrule it."

To the same effect: *Huguley Manufacturing Company v. Galeton Cotton Mills,* (*1092*), *184 U. S. 290.*

The cases cited for defendant in error, to wit: Colorado Central Consolidated Mining Company v. Turck, 150, U. S. 138; Borgmeyer v. Idler, 159, U. S. 408; *Ex Parte* Jones, 164 U. S. 691, are not in point, the ruling of those cases being that where the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship, the *subsequent* development of a Federal question, which did not appear upon the record when the jurisdiction of the Circuit Court attached, would not relate back and so become one of the original grounds of jurisdiction.

3rd. The bankrupt act of July 1, 1898, provides in the 23d section as follows:

SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS —*a* The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being adminis-

istered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted unless by consent of the proposed defendant.

c The United States Circuit Courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

Should it be considered that this section of the Bankrupt Act has any bearing upon the ground of jurisdiction under consideration, it should also be considered whether the removal of the suit into the Circuit Court at the petition of the defendant in error, was not the " bringing or prosecuting" of the suit in that court "by the consent" of said defendant within the meaning of sub-division b of section 23, so as to confer upon that court whatever jurisdiction it was the intention of section 23, in the absence of such consent to withhold. It is difficult to conceive how the consent of the defendant, made by sub-division b of said section the condition of such jurisdiction, could be more solemnly and expressly signified and made of record, than was done in this suit by the petition which brought it into the Circuit Court.

In the case of *Bardes v. First National Bank of Hazarden, (1900), 178, U. S. 524* in which the question for decision was the jurisdiction of the United States District Court to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, propery alleged to have been conveyed to him by the bankrupt in fraud of creditors, Mr. Justice GRAY, in delivering the opinion of this court, clearly pointed out that sub-division b of section 23 relates to the relative jurisdiction of the state and United States courts, and says, *inter alia*, beginning on page 536:

"But the 2d clause"—sub-division b of section 23—"applies both to the district courts and to the circuit courts of the United States, as well as to the state courts. This appears, not only by the clear words of the title of the section but also by the use, in this clause, of the words, 'the courts,' as contrasted with the spe-

cific words, 'the United States circuit court,' in the 1st and in the 3d clauses.

* * * * * * * *

"Had there been no bankruptcy proceedings the bankrupt might have brought suit in any state court of competent jurisdiction; or. if there was a sufficient jurisdictional amount and the requisite diversity of citizenship existed, or the case arose under the Constitution or laws or treaties of the United States, he could have brought suit in the circuit court of the United States. Act of August 13, 1888, chap. 866 (24. Stat, at L. 434). He could not have sued in the District Court of the United States because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress a district court has the powers of a circuit court, or is given jurisdiction of a particular class of civil suits.

* * * * * * * *

"On the contrary, Congress, by the 2d clause of section 23 of the present Bankrupt Act, appears to this Court to have clearly manifested its intention that controversies not strictly or properly part of the procedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretense in this case."

This language and logic applies equally to suits in the United State Circuit Courts.

Such being the interpretation of section 23 of the Bankrupt Act, it is respectfully contended that the consent of the defendant in error to the bringing or prosecuting of this suit in the United States Circuit Court for the Eastern District of Pennsylvania, evidenced of record by his petition for its removal to that court, gave life in that court to whatever ground of jurisdiction it was the intention of this section of the act to otherwise suppress.

The natural and reasonable construction of sub-division a of said section 23 of the Bankrupt Act would, it seems to counsel, be, that it was the intention of Congress that the *mere fact*

of bankruptcy should not confer upon the United States Circuit Courts jurisdiction of plenary suits at law or in equity between the trustee in bankruptcy and adverse claimants to property. Or, to quote again the language of this Court, in the case of *Bardes v. First National Bank of Hazvarden, 178 U. S. 536*:

"The 1st clause"—of section 23 of the bankrupt act—"provides that 'the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other), 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees,' restricting that jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.' This clause while relating to the circuits courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, *shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.*"

The italics are inserted by counsel

If—not "*solely* because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy,"—but because a dispute or controversy is really and substantially involved as to a right which depends on the construction of a Federal law, a suit between the trustee in bankruptcy and a stranger to the bankruptcy proceedings arises under a law of the United States, then it is not the intention of this section of the bankruptcy act to withhold from the United States Circuit Courts the jurisdiction of such a suit expressly conferred on said courts by the General Judicature Acts.

The intention of Congress in inserting the provisions of sec-

tion 23 in the bankrupt act of 1898 is made clearer by a consideration of the provisions of prior national bankrupt acts in this regard. In the case of *Bardes v. First National Bank of Hawarden, 178 U. S. 524*, already cited, said provisions of prior national bankrupt acts are referred to and quoted in the opinion of this Court, and it is pointed out that by the provisions of said prior acts *the mere fact of bankruptcy* expressly conferred jurisdiction of all suits either by or against the assignees in bankruptcy upon the circuit and district courts of the United States. After construing, in the language quoted above, the 1st clause of section 23 of the act of 1898 as not conferring jurisdiction upon the circuit courts *solely* by reason of bankruptcy, this court goes on to say by said opinion, page 537:

"The bankrupt acts of 1867 and 1841, as has been seen, each contain a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provisions, and substituted the restrictive provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts."

It seems clear therefore to counsel, from the language of section 23 of the act of 1898, and in the light of the construction placed thereon by this Court in the case of *Bardes v. The First National Bank of Hawarden,* that where the suit by the trustee in bankruptcy against a stranger to the bankruptcy proceedings, aside from the mere fact of bankruptcy, involves Federal questions which under the General Judicature Acts of Congress give jurisdiction of the suit to the United States Circuit Courts, that such jurisdiction is not withheld, and that the General Judicature Acts are not as respects such suits repealed by implication by these provisions of the act of 1898.

The nature and importance of the Federal questions involved in this suit, make them particularly such as were intended both

by the framers of the Constitution and by Congress in all of the judiciary acts to be settled and adjudicated in the inferior courts and in the Supreme Court of the United States. The Constitution of the United States, in conferring upon Congress the right to legislate for the nation in bankruptcy matters provides for the enactment by that body of "uniform laws" on the subject of bankruptcy throughout the United States, and couples the power to enact these laws with that to establish a "uniform rule of naturalization." The word "uniform" is not employed elsewhere in this entire section of the Constitution, which deals wholly with the powers of Congress, and the conclusion seems irresistible that the framers of the Constitution regarded uniformity in these two pieces of legislation as of paramount and vital importance to their satisfactory exercise. The bankrupt act of 1898 is the fourth instance in the history of the nation in which the power conferred upon the Federal legislature in this respect has been exercised by that body. In every instance the diversity of various state insolvent laws, the uncertainty of their operation, the merely partial character of the financial relief which that operation afforded, and the bewildering conflict of decisions in the various state jurisdictions interpreting them, have driven Congress to a fresh exercise of that power. But the "uniformity" so particularly emphasized by the Constitutional provision is practically impossible, in the administration of the present act, unless an authoritative construction of its debatable provisions shall be put upon them by the one tribunal designated by the Constitution itself as the final arbiter of all Federal questions. The force of this will be easily realized by a brief consideration of the questions involved in this case. If it be held that these questions did not confer jurisdiction upon the United States Courts, then the "uniformity" intended by the framers of the Constitution is committed to the chaos of the conflicting decisions of more than forty independent jurisdictions.

The questions involved in the decision of this suit, and dis-

cussed and passed upon in the opinions of both of the lower courts, may be briefly summarized as follows:

1. Were the chattels in controversy "property which prior to the filing of the petition the bankrupts could by any means have transferred or which might have been levied upon and sold under judicial process against them," within the meaning of sub-division 5 of clause a of section 70 of the bankrupt act?

2. Did the secret unrecorded contract between the bankrupts and the defendant in error, and the understanding alleged between them that these chattels should furnish a security for the advancement of money by the defendant in error, in the absence of the transfer of the possession of the chattels, constitute a transfer in fraud of creditors within the meaning of sub-division 4, clause a of section 70 of the bankrupt act?

3. Was the defendant in error a *bona fide* holder for value of these chattels so as to be able to successfully withstand the attack of judgment creditors of the bankrupts and hence of the trustee, within the true intent and meaning of clause e of section 70 of the act?

4. Did title to these chattels vest in the trustee immediately upon his appointment and qualification, as of the date of the adjudication, by virtue of clause a of section 70, and clause a of section 67 of the bankrupt act, the alleged lien or claim of the defendant in error to said chattels not being a matter of record and void as against creditors under the laws of the state of Pennsylvania?

Running through the consideration of these questions, is also the question, of how far the trustee in bankruptcy, as the representative of the creditors, is bound by the agreements and transfers which would have been binding upon the bankrupts.

The suggestion made in the printed brief of the defendant in error upon the motion to dismiss this writ of error, that these questions are merely matters of the application of the provis-

ions of the Bankrupt Act to the facts of this particular case, cannot be maintained. The questions hinge and turn upon the construction of the provisions of the Bankrupt Act, as is made clear hereinafter in the argument upon the merits. Every one of these questions vitally affects the interpretation of important clauses of the act, and the decision of every one of these questions by this Court is vital to the uniform administration of the act. It may without exaggeration be asserted that on no subject has a more conflicting mass of decisions arisen in the state jurisdictions than on questions relating to the validity of secret liens affecting the personal property of insolvents and concerning relative rights of creditors as affected by preferences secured by secret liens and by preferential transfers. One of the important results intended, or at least hoped for from the present bankrupt act, is the creation of a uniformity throughout the nation, as respects these very matters.

Second. So much, as relates to the original jurisdiction of the United States Circuit Court for the Eastern District of Pennsylvania.

Plaintiff in error contends that the right to this writ of error is also expressly conferred by clause b and sub-division 1 of the 25th section of the Bankrupt Act of July 1, 1898, which section is as follows:

SEC. 25. APPEALS AND WRITS OF ERROR.—*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under

such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

The questions which naturally present themselves in seeking the proper construction of this section of the statute, are:

1st. Whether the words, "a claim under this Act" in clause b refer to any claim of right based upon some provision of the Act, or relate solely to debts claimed against the estate of the bankrupt:

2nd. Whether the questions involved in this suit are in the language of sub-division 1 of clause b, such as "might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States";

3rd. Whether the writ of error in this case was in the language of clause b, "had under such rules and within such time as may be prescribed by the Supreme Court of the United States."

Counsel feel that the following propositions will be accepted without discussion, to wit:

A. That the "court of appeals" named in said clause b, re-

fers to the United States Courts of Appeals, and that the appeal given must necessarily be to the Supreme Court of the United States.

B. That the whole of said section 25 dealing, as the caption, "Appeals and Writs of Error," given to the section by Congress. indicates, with the removal of causes from inferior to superior courts,—that the language used in clause b, "an appeal may be had," confers the right to a writ of error wherever that is the proper appellate process. Should there by any doubt of this, it would seem to be removed by the language of subdivision 1, just following, which is:

"1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States."

The amount in controversy in the suit at bar exceeds the sum of two thousand dollars.

1st The natural import of the language, "a claim under this Act," is a claim of some right based upon some provision of the act itself. This exactly describes and defines the cause of action of the plaintiff in error. The declaration, filed by the plaintiff in error in the Court of Common Pleas of Lehigh County, Pennsylvania, shows that his cause of action was based, and that every element of the title set up by him to the chattels in controversy, was founded, upon the provisions of the bankrupt act of July 1, 1898. The word "claim" as used in the bankrupt act of July 1, 1898, is not defined in section 1 of the act. While the word is frequently used throughout the act with reference to a debt against the bankrupt, as in section 57, yet in every such case either the context or the qualifying words in immediate juxta-position are such as to clearly indicate thereby the meaning there intended, and as to make such use of the word natural and in accordance with common usage. In section 2, sub-division (11), of the act, the demand of the bankrupt to his exemption is called a "claim." In clause a of section 25 of the act, just preceding clause b, under discussion, in con-

ferring the right of appeal from the courts of bankruptcy to the circuit of appeals of the United States, the language is used, "(3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." Immediately following this, in clause b, however, the language is, "a claim under this Act," a forcible indication that the language quoted from clause a, "a debt or claim," and the language quoted from clause b, "a claim under this Act," are intended to define entirely different classes of causes, the first referring to a debt or claim arising in bankruptcy proceedings in a court of bankruptcy, while the second refers to a claim made under the Act in whatever proceeding and in whatever court of the United States.

The word CLAIM is thus defined:

Webster's International Dictionary:

"CLAIM. 1. A demand of a right or supposed right; a calling on another for something due or supposed to be due; an assertion of a right or a fact.

"2. A right to claim or demand something; a title to any debt, privilege, or other thing in possession of another; also, a title to anything which another should give or concede to, or confer on, the claimant."

Bouvier's Law Dictionary:

"CLAIM. A challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant."

Rapalje & Lawrence's Law Dictionary:

"CLAIM. A challenge by any man of the property or ownership of a thing, not at the time in his possession, but (as he contends) wrongfully withheld from him."

Black's Law Dictionary:

"CLAIM. A challenge of the property or ownership of a thing which is wrongfully withheld from the possession of the claimant.

"A claim is a right or title, actual or supposed, to a debt, privilege, or other thing in the possession of another; not the possession, but the means by or through which the claimant obtains the possession or enjoyment. 2d. N. Y. 245, 254.

"A claim is, in a just, juridical sense, a demand of some matter as of right made by one person upon another, to do or to

forbear to do some act or thing as a matter of duty. A more limited, but at the same time an equally expressive, definition was given by Lord Dyer, that 'a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him.' 16 Pet. 615.

" 'Claim' has generally been defined as a demand for a thing, the ownership of which, or an interest in which, is in the claimant, but the possession of which is wrongfully withheld by another. But a broader meaning must be accorded it. A demand for damages for criminal conversation with plaintiff's wife is a claim; but it would be doing violence to language to say that such damages are property of plaintiff which defendant withholds. In common parlance the noun 'claim' means an assertion, a pretension; and the verb is often used (not quite correctly) as a synonym for 'state,' 'urge,' 'insist,' or 'assert.' In a statute authorizing the courts to order a bill of particulars of the 'claim' of either property, 'claim' is co-extensive with 'case,' and embraces all causes of action and all grounds of defense, the pleas of both parties, and pleas in confession and avoidance, no less than complaints and counter-claims. It warrants the court in requiring a defendant who justifies in a libel suit to furnish particulars of the facts relied upon in justification, 6 Daly, 446."

In the case of *Prigg v. Pennsylvania, 16 Peters 539*, in the opinion of the court by Mr. Justice Story, it is said:

"A claim is to be made. What is a claim? It is in a just juridical sense a demand of some matter as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty. A more limited but at the same time an equally expressive definition was given by Lord Dyer as cited in Stowel v. Zouch Plowd. 359, and it is equally applicable to the present case: that a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him."

To the same effect: *Coster v. Albany, 43 N. Y. 413*; *United States v. Spaulding. 3 Dakota 93*; *Pea v. Waggoner, 5 Hayw. (Tenn.) 1*; *Bourland v. Hildreth, 26 Cal. 205*; *Robinson v. Wiley, 15 N. Y. 491*; *Lopez v. United States 24 Ct. of Cl. 95*; *Kansas City v. Ridenour, 84 Mo. 253.*

In *Howell v. Buffalo, 15 N. Y. 523, Denio, C. J.*, says:

"Demands or claims are the largest words of that class, and clearly embrace a cause of action founded upon a trespass to personal property. Littleton says that the most beneficial release which a man can have is a release from all demands (section 508); and Lord Coke declares that a release of all claims extends to all demands. Co. Litt. 291 b."

2nd. It has already been shown at some length in this argument, that this suit involves Federal questions, to wit: The construction of various provisions of the act of Congress of July 1, 1898. We confidently contend that had this suit continued to be prosecuted under the state jurisdiction, and had the verdict of the jury in the Court of Common Pleas of Lehigh County, Pennsylvania, been in favor of the plaintiff in error as was the verdict in the United States Circuit Court for the Eastern District of Pennsylvania, and had the judgment thereon been reversed by the Supreme Court of Pennsylvania, as it was in this case by the United States Circuit Court of Appeals for the Third Circuit. that a writ of error to remove the case to the Supreme Court of the United States would have been of right.

Section 709 of the Revised Statutes of the United States provides:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, ... where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

The title and right specially set up or claimed by the plaintiff in error in the declaration filed by him, and throughout the course of the trial of the case in both of the lower courts, have

already been set out at some length. The opinion of Judge McPherson ordering judgment in favor of the plaintiff in error in the United States Circuit Court for the Eastern District of Pennsylvania, (Printed Record 36), show that the title and right claimed by the plaintiff in error under the provisions of the act of Congress of July 1, 1898, were fully discussed and decided in favor of the plaintiff in error. The opinion of Judge Gray in the United States Circuit Court of Appeals for the Third Circuit, (Printed Record 45), show that the same title and right contended for by the plaintiff in error, were fully passed upon by the United States Circuit Court of Appeals for the Third Circuit, and that the decision therein was against said title and right.

The case of Cameron v. The United States, 146 U. S. 533, cited by the defendant in error for the proposition that the Supreme Court of the United States will not review a judgment of the highest court of a state in a case where no question is raised as to the validity of a statute of the United States, but merely the application of the statute to the facts of the case involved, has absolutely no application. Not the validity of the statute, but the validity of the title and right claimed by the plaintiff in error under the statute, is the matter of controversy. In the case of Cameron v. The United States, the opinion of this Court simply interpreted the act of Congress of March 3, 1885, 23 St. 443 c. 355, relating to appeals from *territorial* Supreme Courts to this Court. It has no reference whatever to *state* tribunals, nor was the practice relating to appeals from such tribunals to this Court so much as alluded to. The writ was dismissed in the Cameron case because it did not appear that the jurisdictional amount was involved.

In the case of *Williams v. Heard* (*1891*), *140 U. S. 529*, suit was brought by certain bankrupts against their assignees in bankruptcy to recover money which had been paid to the latter by the United States under an award by the Court of Commissioners of Alabama Claims by authority of the act of Congress approved June 5, 1882. The money in question was a

refund of excess premiums of marine insurance paid by the bankrupts during the civil war and long before their bankruptcy which did not occur until in 1875. The case was prosecuted in the state courts of Massachusetts, and decided in favor of the plaintiffs and against the assignee in bankruptcy by the Supreme Judicial Court of that state. A writ of error having been taken to this Court, the judgment of the Massachusetts court was reversed in an opinion by Mr. Justice LAMAR:

"As preliminary to the discussion of the merits of this case, it is argued by the defendants in error that this is not a Federal question, and that therefore the writ of error should be dismissed. We do not think, however, that this contention can be sustained. Both parties claim the proceeds of the award, the defendants in error asserting that it did not pass to their assignees in bankruptcy under section 5044 of the Revised Statutes, and the plaintiff in error insisting that the claim was a part of their estate at the date of their adjudication in bankruptcy and did pass to the assignees under that section of the Revised Statutes. The assignee's claim to the award is based on that section of the statutes; and as the State Court decided against him, this Court has jurisdiction under Section 709 Revised Statutes to review that judgment; for the decision of the State Court was against a 'right' or 'title' claimed under a statute of the United States within the meaning of that section."

Followed and approved in *Dushane v. Beall (1895), 161 U. S. 513*, where a question affecting the interpration of section 5057 Revised Statutes in a matter very similar to the case at Bar was held to give this Court jurisdiction to review the judgment of the Supreme Court of Pennsylvania, this Court saying in an opinion by Mr. Chief Justice FULLER:

"The question whether the assignee in bankruptcy was entitled to this claim is clearly a Federal question Williams v. Heard, 140 U. S. 529. And if all the facts stated in the record before us do not as matter of law, warrant the conclusion at which the highest Court of the State arrived on this question it is the duty of this Court so to declare and to render judgment accordingly."

See also the opinion of Chief Justice MARSHALL in Cohens v. Virginia (1821), 6 Wheaton 264.

In the recent case of *Talbot v. The Sioux City National Bank, (1902), 185 U. S. 172*, it was held by this Court in an opinion by Mr. Justice McKenna, that it possessed the right to review a judgment of the Supreme Court of Iowa which denied to the plaintiff in error a right which he claimed under sections 5197-98 of the Revised Statutes of the United States with reference to the exaction of illegal interest by a national bank.

Again, in *Roby v. Colehour, 146 U. S. 152*, it was held by this Court that its appellate jurisdiction could be invoked to review the judgment of a state court under section 709 of the Revised Statutes of the United States where a right or immunity set up and claimed under the Constitution or laws of the United States had been denied by the judgment of the state court sought to be reviewed, even though it might not appear that the state court had formally passed upon any question of a Federal nature.

In the case of *Stanley v. Schwalby, 162 U. S. 255*, which was a suit brought in the state courts of Texas and removed to this Court by writ of error from the Court of Civil Appeals of the Fourth Judicial District of Texas, this court say in the opinion of Mr. Justice Gray, pages 278, 279:

"But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on mesne process issued by a court of the United States, and is sued in an action of trespass in a state court by one claiming title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the state, he may bring the case by writ of error to this court; and, as his justification depends upon the question whether the title to the property was in the defendant in attachment, or in the plaintiff in the action of tresspass, this court, upon the writ of

error, has the power to decide that question, so far as it is one of law, even if it depends upon local law, or upon general principles. Buck v. Colbach, 3 Wall, 334; Etheridge v. Sperry, 139 U. S. 266; Bock v. Perkins, 139 U. S. 628. And see McNulta v. Lockridge, 141 U. S. 327, 331; Dushane v. Beall, 161 U. S. 513."

In the case of *McKenna v. Simpson, 129 U. S. 506,* which was a suit by an assignee in bankruptcy in the state courts of Tennessee to recover real estate alleged to have been conveyed in fraud of creditors by the bankrupt before his adjudication, the writ of error to review the decision of the Supreme Court of Tennessee was held by this Court not to lie, because the decision of the Supreme Court of Tennessee was in favor of the assignee in bankruptcy, or in other words in favor of the title and right specially set up under the laws of the United States, and hence the decision sought to be reviewed was not against, but in favor of, the validity of said title and right.

Not only is the title and right specially set up or claimed by the plaintiff in error in this case, made to appear by the declaration filed by him in the Court of Common Pleas of Lehigh County, Pennsylvania; but the same are also clearly shown forth in the opinions both of the United States Circuit Court for the Eastern District of Pennsylvania and of the United States Circuit Court of Appeals for the Third Circuit. Had this case taken its course in the state courts, and had the said title and right as specially set up and claimed by the plaintiff in error, been shown forth in the opinions of the courts of the state, in the same manner that they are in the opinions of the lower United States courts, there can be no question but that such denial of the same and decision against their validity would have entitled the plaintiff in error to have removed the case to this Court by writ of error.

In the case of *Tulock v. Mulvane, (1902), 184 U. S. 497,* which was a writ of error to the Supreme Court of the state of Kansas, the suit involved the construction of an injunction bond filed in an equity case in the United States courts, and also the

question as to whether attorneys' fees were an element of damages properly recoverable under said bond. In the opinion of this Court rendered by Mr. Justice WHITE, it is said, page 503:

"We dispose at once of the contention that if the propositions involve Federal questions they were not duly raised below; by referring to the statement which we have made of the case, whereby it appears that the contentions were raised below by the pleadings, by the objections to evidence, and by the requests for instructions, and indeed as so raised were expressly considered and directly passed upon by both the trial court and the Supreme Court of the state of Kansas, which latter fact in and of itself suffices to present the Federal question, even if it had been otherwise ambiguously raised on the record, which is not the case. Oxley Stave Co. v. Butler County, 166 U. S. 648."

The dissent of HARLAN, J., FULLER, C. J., and BROWN, J., did not go to the language quoted, but to the question of whether the contentions raised in the state courts actually involved any Federal question.

In the case of *Oxley Stave Co. v. Butler, (1897), 166 U. S. 648*, which was a writ of error to the Supreme Court of the state of Missouri, this Court, in its opinion by Mr. Justice HARLAN, after showing that it is not always necessary to refer to the precise words or to the particular section of the Constitution or United States statute under which some right, title, privilege or immunity is claimed, and that it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under the Constitution or a United States statute, says, page 660:

"If it appeared that the Supreme Court of the state regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained."

To the same general effect: *Loeb v. Columbia Township Trustees, 179 U. S. 472*; *United States v. Taylor, 147 U. S. 695, 700*; *Sayward v. Denny, 158, U. S. 180, 181*; *Gross v. United States Mortgage Co., 108 U. S. 477, 486.*

3rd. The 25th section of the act of Congress of July 1, 1898, under which it is contended that this writ of error is of right, provides in sub-division b that the appellate process "may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States."

The only rules prescribed by the Supreme Court of the United States specially applicable to proceedings under this act of Congress, are the "General Orders in Bankruptcy" adopted by this Court at the October term, 1898. The XXXVI. of these General Orders is as follows:

"XXXVI. APPEALS.

"1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act by the rules governing appeals in equity in the courts of the United States.

"2. Appeals under the act to the Supreme Court of the United States from the circuit court of appeals, or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a Justice of the Supreme Court of the United States. States.

"3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies, shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United Sates on such an appeal shall consist only of the pleadings, the judgment or decree, the findings of facts, and the conclusions of law."

The writ of error in this case was specially allowed by Mr. Justice SHIRAS of the Supreme Court of the United States. It was not, however, sued out within thirty days after the judgment sought to be reviewed thereby.

It is the belief of counsel for the plaintiff in error that the XXXVI. General Order in bankruptcy, quoted above, does not apply to writs of error, but solely to appeals technically so called, as in equity. The 1st paragraph of this General Order clearly relates solely to such appeals technically so called, as in equity, since it is provided that the same "shall be regulated except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."

The 3rd paragraph of this General Order clearly relates solely to appeals technically so called, as in equity, since it provides that "the court from which the appeal lies, shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal, shall consist only of the pleadings, the judgment or decree, the findings of fact, and the conclusions of law."

The 2nd paragraph of the General Order would seem equally to have been intended to apply only to appeals technically so called, as in equity, not only by force of the context, both the 1st and 3rd paragraphs being confined in application to such appeals, as in equity, but also by force of the language of the paragraph itself. It says. "Appeals under the act . . . from the circuit court of appeals or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever," thus indicating that the paragraph has relation to appeals in bankruptcy proceedings pending in courts of bankruptcy, and that the appeals from the courts named, "or from any court of bankruptcy whatever," are to be appeals technically so called, as in equity, taken in bankruptcy proceedings as distinguished from independent suits at law.

As illustrative of the class of appeals to which it is conceived this General Order was intended to relate, may be cited the case of *Page v. Edmunds, 187 U. S. 596*, which was an appeal technically so called from the Circuit Court of Appeals for the

Third Circuit, as in equity, involving the question of whether a seat or membership in a stock exchange belonging to a bankrupt becomes an asset of his estate in the hands of the trustee in bankruptcy; and this appeal to the Supreme Court of the United States was not conferred by any provision of the 25th section of the Bankrupt Act of 1898, but evidently was taken under the provisions of the 24th section of the Act, conferring general appellate jurisdiction upon the Supreme Court of the United States "of controversies arising in bankruptcy proceedings, from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

The XXXVII. General Order in bankruptcy, however, would seem to make ample provision, so far as any was necessary, for the regulation of writs of error for the removal of cases to the Supreme Court of the United States under the provisions of section 25 of the Act. This General Order is as follows:

"XXXVII. General Provisions.

"In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the Judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."

This suit is a "proceeding at law, instituted for the purpose of enforcing rights and remedies given by the act." and hence, as well in the lower courts as in this Court, "the practice and procedure in cases at law shall be followed as nearly as may be."

It is therefore respectfully submitted, that the writ of error in this case was "had under such rules and within such time as may be prescribed by the Supreme Court of the United States," within the true intent and meaning of subdivision b of section 25 of the Act.

One further consideration, arising from the general scope of the bankrupt act of 1898, and from the legislative intention as evidenced by a comprehensive view of the provisions of the act, presents an important reason for the construction here sought to be placed on the 25th section of the act. It is to be assumed that Congress intended to secure that uniformity, both in the substantive provisions and in the remedial processes, established by the act, which the 5th paragraph of the 8th section of the 1st article of the Constitution requires.

All controversies which may arise for adjudication in a Court of Justice under the provisions of the bankrupt act of 1898, fall naturally into two general classes, to wit: 1st. Controversies arising in bankruptcy proceedings in courts of bankruptcy, which must of necessity have their rise and conclusion in the courts of the United States; and 2nd., plenary suits at law or in equity for the enforcement of some right, title, privilege or immunity claimed under some provision of the act, which suits may some of them be within the exclusive jurisdiction of the state courts, and some within the concurrent jurisdiction of the state and of the United States courts.

It has already been shown that a suit of the second general class, involving a Federal question, and in which some right, title, privilege or immunity specially set up or claimed under the act has been denied in the state courts, may be removed by a writ of error to the Supreme Court of the United States. Can it have been the intention of Congress that the same suit involving precisely the same question, whether originally brought in the state court and removed to the Circuit Court of the United States as in the case at Bar, or originally brought and prosecuted in the Circuit Court of the United States, in which the same right, title, privilege or immunity has been specially set up or claimed under some provision of the act and denied by the circuit court of appeals, cannot be removed by writ of error to the Supreme Court of the United States? Did Congress intend, in such a case, to place it within the power of a defendant who by reason of the accident of diverse citizenship

might be able to remove the suit from the courts of the state into the Circuit Court of the United States, to thereby deprive the opposite party setting up and claiming a right, title or immunity under the act, of the right to have the denial of the same reviewed by the Supreme Court of the United States?

On the contrary, does not the express language of section 25 of the act, giving the right to remove into the Supreme Court of the United States any final decision of a court of appeals when "the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States," show forth in the clearest manner and in unmistakable language the intention of Congress, to preserve to the party aggrieved by such a decision in the United States Courts the same right of appeal which would have been his had the case taken its course in the courts of the state?

By this construction, uniformity is given to the general scheme of appellate remedy provided in the act, and to the plain language of the act itself; while by the opposite construction, a most incongruous state of affairs would be created, depriving parties by the mere accident of diversity of citizenship and in such cases at the will of the opposing party, of the appellate rights, recognized and preserved under the Constitution and General Judicature Acts, as well as by the express provisions of the bankrupt act of 1898.

THIRD. The Supreme Court of the United States, even if of the opinion that they do not possess ordinary appellate jurisdiction in this case, may because of the importance of the questions involved treat this writ of error as a certiorari.

The 2nd clause of the 6th section of the act of Congress of 1891 creating United States circuit courts of appeals, provides:

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and

determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

In The Three Friends case, (1896), 166 U. S. 1, a certiorari was allowed to the Circuit Court of Appeals for the Fifth Circuit in a case of a libel in admiralty. The libel was filed in the United States District Court for the Southern District of Florida, and upon hearing was dismissed. From this decision the United States appealed to the Circuit Court of Appeals for the Fifth Circuit, and then (before a hearing in that court) applied to the Supreme Court of the United States for a certiorari which was allowed. It will be observed that an admiralty case is one of those in which by the act of March 3, 1891, the jurisdiction of the Circuit Court of Appeals is made final. This court said, through Mr. Chief Justice FULLER:

"In admiralty cases, among others enumerated, the decree of the Circuit Court of Appeals is made final in that Court by the terms of section 6 of the Judiciary Act of March 3rd, 1891, but this Court may require any such case, by certiorari or otherwise, to be certified 'for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,' that is, as if it had been brought directly from the District or Circuit Court. 26 Stat. 826-828, c. 517 section 6.

Accordingly the writ of certiorari may be issued in such cases to the Circuit Court of Appeals, pending action by that Court, and although this is a power not ordinarily to be exercised, (American Construction Co. vs. Jacksonville Rwy. 148 U. S. 372-385), we were of the opinion that the circumstances justified the allowance of the writ in this instance, and the case is properly before us."

And in *Security Trust Co. vs. Dent. (1902), 187 U. S. 237,* this Court held that where a case had been brought before them improvidently by writ of error instead of certiorari from the final judgment of the Circuit Court of Appeals, this Court under the powers conferred by the Act of March 3, 1891, could allow the certiorari, and direct that the record sent up under the writ of error should be taken as a return to the former. This was a

suit in the Circuit Court for the Ditsrict of Minnesota by the Receiver of a National Bank in Iowa against the Security Trust Company in St. Paul, administrator of a decedent alleged to have been indebted to the bank. The ground of Federal jurisdiction seems to have been only the diverse citizenship of the parties. Under the Act the decision of the Circuit Court of Appeals would therefore have been final, and indeed the wording of the opinion of this Court by Mr. Justice SHIRAS appears to concede this.

See also *Security Trust Co. vs. Black River National Bank, (1902), 187 U. S. 211.*

In *Chicago & N. W. Ry. Co. vs. Osborne, (1892). 146 U. S. 354,* which was a suit for the violation of the Inter-State Commerce Law, a petition for a certiorari was denied.

In *Lau Ow Bew vs. U. S. (Nov. 2, 1891), 141 U. S. 583,* a petition for certiorari to the Circuit Court of Appeals for the Ninth Circuit to review a final decree of that Court refusing a writ of habeas corpus to the applicant, a Chinese merchant, who had left the United States temporarily, *animo revertendi,* but who was not allowed to land upon returning, was granted, Mr. Chief Justice FULLER saying on page 587:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked. The inquiry upon this application therefore is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this Court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error."

II.

Upon the Merits.

Before taking up the assignments of error, it should be stated that Bennett & Rothrock were adjudged bankrupts by the United States District Court for the Western District of Pennsylvania on January 13, 1900, and that on August 30, 1899, they had entered into a written contract with the Duplan Silk Company, the defendant in error, to furnish the materials and erect for said company a silk mill at Hazleton, Pennsylvania. This contract, which is printed in full in this Brief in the Abstract or Statement of the case, *supra* page 4, contained an express and specific stipulation and covenant against the filing of machanics liens against the building to be erected, by sub-contractors, materialmen or others, in the following language:

"And it is hereby especially stipulated, covenanted and agreed that no material-man, or any person other than the contractor, the aforesaid Bennett & Rothrock, shall have any right to file or maintain any machanic's lien for work done or materials furnished to the aforesaid building; and any right to file such lien is hereby expressly waived."

This contract was, on September 2, 1899, before the building operations began, recorded in the office of the Prothonotary of Luzerne County, Pennsylvania, within which Hazleton lies.

(See offer in evidence in trial court of said recorded contract, duly certified acccording to Act of Congress, page 19 of Printed Record).

The Act of the Assembly of Pennsylvania, approved June 26, 1895, P. L. 369, is as follows, to wit:

AN ACT.

To regulate building contracts where such contracts have as part thereof either incorporated or separately made a stipulation that no mechanics' liens shall be filed against the building,

whether by the contractor or by any sub-contractor, materialman or other person, requiring that such stipulation shall be in writing, and shall be recorded in the prothonotary's office in the county in which the land lies.

SECTION 1. Be it enacted, &c., That no contract for the erection of the whole or any part of any building hereafter made, and no stipulation separately made as part of any such contract, whereby it is sought to deprive or hinder a contractor, sub-contractor, materialman or other person from filing or maintaining a lien, commonly called a mechanics' lien, for work done or material furnished to such building or to any part thereof, shall operate to defeat the right of any sub-contractor, materialman or other person to file and maintain such a lien, unless such contractor or the stipulation shall specifically covenant against such lien by sub-contractor or other person, and unless said stipulation shall be put in writing and signed by the parties thereto prior to the time authority is given to the principal contractor to proceed with said work, and unless said contract or said stipulation shall be filed with the prothonotary of the county where the land lies for record within ten days after its execution.

SECTION 2. The prothonotary shall record such contract or stipulation in the docket provided for mechanics' liens, shall index the same, making the contractor the plaintiff and the owner the defendant, and shall receive for his service the same fee as for filing and recording a mechanics' lien.

This recorded contract and Pennsylvania statute are cited, for the purpose of showing that the tools and building materials in controversy in this case could not have been furnished to Bennett & Rothrock, the bankrupts, upon the credit of the building they were erecting, or of the owner thereof, and that those who furnished said tools and materials could not file against said building mechanics' liens for the same.

It also appeared upon the trial in the Circuit Court, by the testimony of Emory J. Lipps, (Printed Record, pages 27-34), a witness for defendant in error, that a separate, supplementary contract between the bankrupts and the defendant in error, unknown to anyone else and never recorded, was executed at the same time with the building contract above referred to, and contained the following clause:

"ART. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after days' written notice to the contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under the contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of much discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work and any damages incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

The plaintiff in error offered in evidence at the trial exemplification of the entire record in the matter of the petition of Bennett & Rothrock for adjudication in bankruptcy, No. 802 in Bankruptcy in the District Court of the United States, for the Western District of Pennsylvania, duly certified under the seal of the Court, by the Clerk of the Court and the District Judge. (See Printed Record, page 19).

This record showed the adjudication of Bennett & Rothrock to be bankrupts on January 13, 1900, the due election and qualification of W. H. Spencer, as the trustee of their estate; that the chattels in controversy at bar were scheduled among their as-

sets; and that there were numerous judgments against them, and executions out against them when the petition was filed and the adjudication made.

The Bill of Exceptions sealed for the defendant in error in the United States Circuit Court for the Eastern District of Pennsylvania, and sent up with the record, on the writ of error of said present defendant in error, to the United States Circuit Court of Appeals for the Third Circuit, (Printer Record, pages 18-43), contains neither the aforesaid exemplification of the recorded contract between the parties as aforesaid, nor said secret unrecorded contract, nor the aforesaid certified exemplification of the record of said bankruptcy proceedings in the United States District Court for the Western District of Pennsylvania.

Should this Court find this documentary evidence, duly offered in the trial court, to be material to the decision of the questions raised by the assignments of error, or necessary in order to determine whether upon the whole of the evidence the trial court correctly instructed the jury to find for the plaintiff in error and correctly entered judgment for the plaintiff in error upon such verdict,—and such documentary evidence certainly is thus material,—then the absence thereof from the record by reason of the failure of the defendant in error to have the same incorporated in its Bill of Exceptions on its appeal to the United States Circuit Court of Appeals for the Third Circuit, would require the reversal of the judgment of said appellate court and the affirmance of the judgment of the United States Circuit Court for the Eastern District of Pennsylvania.

It is the duty of the plaintiff in error—which the present defendant in error was in the United States Circuit Court of Appeals for the Third Circuit—to include in the Bill of Exceptions all the evidence necessary to a decision of the assignments of error, and where the question raised is whether the trial court erred under all the evidence in giving peremptory instructions to the jury, the Bill of Exceptions should contain the entire evidence: Red River Cattle Co. vs. Sully, 144 U. S., 209; Kingory vs. United States, 44 Fed. Rep. 669; Hansen vs. Boyd, 161 U.

S. 397; United States vs. Patrick, 73 Fed. Rep. 800; Taylor-Craig Corp. vs. Hage, 69 Fed. Rep. 581; Union Pac. Ry. Co. vs. Harris, 63 Fed. Rep. 800; Gulf, C. & S. F. R. Co. vs. Washington, 49 Fed. Rep. 347.

In the Circuit Court of Appeals below, at the argument, it was agreed by counsel that this documentary evidence might be considered by the court to enable it to reach the merits of the case.

Upon the Assignments of Error, the plaintiff in error contends:

First. That upon the terms of the building contracts, title in the chattels in controversy vested in the trustee in bankruptcy; and

Second. That notwithstanding any rights secured to the defendant in error, title to the chattels in controversy vested in the trustee in bankruptcy by force of the express provisions of the Bankrupt Act of 1898.

FIRST. The Bankrupt Act of 1898 provides in the seventieth section thereof, as follows:

"SECTION 70. Title to property.—a The trustee of the estate of the bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: * * * and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

The building materials and tools which constitute the property in controversy in this action, were, it is not disputed, bought by Bennett & Rothrock on their own credit, and shipped to Hazleton where the building was being erected, in their name, and taken by them to the site of the building being erected. This was in accord with the terms of the building contract, which provided that Bennett & Rothrock were to provide the materials and erect the building. Had these materials been elsewhere, say at the yards of the bankrupts at Williamsport, the ownership of them by Bennett & Rothrock on the date of their bankruptcy would not be questioned; and the mere circumstance that they were intended to be built into the structure being erected for the plaintiff in error, and had with that object in view been transported to the site of the operations, could under the authorities work no change in the title, until the materials had actually been built into the structure.

It is contended for the plaintiff in error that these chattels might, in the language of the Bankrupt Act quoted above, prior to the filing of the petition, "have been levied upon and sold under judicial process against" Bennett & Rothrock. If so, then title to the same passed to the trustee in bankruptcy, on January 13, 1900, by force of the provision of the Bankrupt Act above quoted.

In the case of *Manchester Mills vs. Rundlett, 23 N. H., 271*, which was trover for 34 pairs of window blinds, levied upon by a creditor of Brandon, the contractor, the court say per Perley, Judge:

"The blinds were indeed designed by Brandon, (the contractor), to be put on the house, but they were designed for that purpose from the time when they were purchased; and if the intention of using them in the performance of a contract can give the property to the plaintiffs, the act of fitting them to the house would be immaterial. No point can be fixed in the course of the manufacture of the blinds when they would pass to the plaintiffs and become theirs. Till they were finally completed hung on the house to remain as part of it. there was no delivery to the plaintiffs, nor any annexation to the house.

"If the state of the account shows that Brandon had been paid in advance of his work on the house, it would not affect the question. Bennett vs. Platt, 9 Pick. 558; Young vs. Austin, 6 Pick. 280."

In the case of *Johnson vs. Hunt, 11 Wendell, 135*, the court for the correction of errors, say, per Savage, Ch. J.;

"By the contract, the defendant was to procure the materials and build the house for the plaintiff. The materials were purchased by the defendant, were his own, and at his risk. The fact that such materials were *intended* for the plaintiff's house did not change the property."

In the case of *Crockett vs. Latimer, 20 Tenn. (1 Humphrey), 272*, the syllabus of the case, which well states the decision of the court, is as follows:

"Brown contracted to build Crockett a brick house at eight dollars per thousand for the brick; Crockett was to advance money to the hands employed by Brown in making the brick, which advances Crockett was to charge to Brown: *Held*, that the brick made by Brown under this contract were his brick until put in the house, and were subject to executions against Brown."

In the case of *City of Wheeling vs. Baer, 36. W. Va. 777*, the syllabus of the case is as follows:

"Where one contracts to furnish material and build a bridge for a city, stones prepared for the bridge remain the property of the contractor until put into the bridge structure and are liable to process for his debts. unless the contract otherwise provide. This is so, though the contract provides, that, as the work goes on, estimates of it shall be made by the engineer, which, if he choose, may include acceptable material, and a percentage of such estimate to be at once paid, and the residue upon completion of the bridges, and an estimate is made including such stone, and such percentage of it paid to the contractor."

The court say in this case, inter alia, pp. 778 to 780:

"Plainly this was a contract to build a bridge, and not a sale of either that bridge or the constituent materials to be used in its construction. These materials remained the property of (the contractors) until incorporated into the permanent structure of the bridge.

"In Moore vs. Cunningham, 23 Ill. 328, it was the incorporation of the brick into the wall which was recognized by the court as passing title to them from the builder.

"Trip vs. Armitage, 4 Mees. & W. 687, was a contract for building a hotel, and sash frames intended for it were sent to it, approved by the superintendent, and sent back to the builders' shop, with iron pulleys belonging to the hotel owners, with directions to fit them in the frames, which was done, and before the sash were taken away the builder became a bankrupt. The court of exchequer held that property in the frames had not passed out of the builder. Lord Abinger put it on the ground that there had been no contract of sale and purchase of goods and movable chattels, but a contract to make up materials and fix them, and, until they are fixed, by the nature of the contract the property will not pass.' He put it as a test that if the frames had been destroyed by fire the builder would have lost them, for the hotel owner was not bound to pay for anything till put up and fixed. Baron Parke said: 'In this case there is no contract at all with respect to these particular chattels; it is merely parcel of a large contract.' * * * *

"In Wood vs. Bell, 5 El. and Bl. 772, steam engines were designed for a ship, and there was a quantity of iron plates and angles specially made ready to be riveted to it, lying partly at the wharf and partly elsewhere, and other materials in like condition, prepared expressly for the ship, but not yet fixed to it. The higher court said that it did not follow that because the ship, as constructed from time to time, became the property of the party paying for her construction, the materials designed for it passed also. The chief justice said: 'What is the contract? The contract is for the purchase of a ship, not for the purchase of everything in use for the making of a ship; not for the purchase of everything bought for it.' * * * * * *

"In the New York case of Andrews vs. Durant, 11 N. Y. 35, it is said that the general rule is that, under a contract for building a vessel or other thing, no property vests in the person for whom it is to be built until finished and delivered, and that the rule is the same where certain portions of the contract price are agreed to be paid to the builder at specified stages of the work, and where an agent of the person for whom the article is to be constructed is to and does superintend and approve the materials and work. So, also, in Elliott vs. Edwards, 35 N. J. Law 265."

It is, however, contended by the defendant in error, and held by the appellate court below, that under the fifth article of the secret, unrecorded and supplementary contract, the defendant in error had the right to take possession of the tools and materials in question. The language of this article of said contract is as follows:

"ART. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and deligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after days' written notice to the contractors to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under the contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work and any damages incurred through such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

As to this contention, we respectfully insist that upon three grounds either one of which is sufficient in law, title to the chattels in controversy, either absolute or qualified, did not pass to the defendant in error. These three grounds are: 1, That the certificate of the architects, expressly required by the terms

of the agreement, was a condition precedent to the right of the owner to exercise the option of taking possession of the materials and tools, which condition precedent the evidence shows was not complied with in this case; 2, That the act of taking possession of these chattels by the defendant, under the notice which was given to Bennett & Rothrock, was not performed, and could not be under the contract, until January 15, 1900, before which date the title of the trustee vested and became absolute; 3, That entirely irrespective of the provisions and effect of the contract and of the acts performed thereunder, the chattels in controversy, being still in the possession of Bennett & Rothrock, might on January 13, 1900, the date of bankruptcy, have been levied upon by their creditors, and title thereto, by reason thereof, passed by force of the express language of the Bankrupt Act absolutely to the trustee.

As to these three grounds:

1. Both the recorded contract, and the other one produced at the trial by the defendant in error, which seems to constitute one contract, name William Steele & Sons as the architects of this building. E. J. Lipps was the representative, not of the architects, but of the owners, the defendant in this case. The unrecorded contract does not name Lipps either as one of the architects or as in any sense a representative of the architects, but names him solely as a representative of the owner. There is no proof or attempt at proof that Lipps had any authority of any sort to represent the architects. The office of Lipps was at South Bethlehem, Pennsylvania, and that of the architects in the Witherspoon Building in Philadelphia. The defendant in error produced at the trial and offered in evidence a type-written paper signed by William Steele & Sons, which expressly purports to be based upon information furnished William Steele & Sons, by Lipps, and not acquired by William Steele & Sons from an actual inspection of the building. While all the rest of this document is type-written, the date is inserted, by whom does not appear, in ink. Lipps, who fur-

nished the only evidence upon the point, testified under cross-examination, on page 32 of the Printed Record, as follows:

"Q. Then it is not a fact that when you went to William Steele & Sons and told them that you had sent these notices to Bennett & Rothrock, and they told you that was right, you then asked them, or subsequently to that you asked them, if not just then, to give you this written certificate that was read?

"A. I think so; yes, sir.

"Q. In pursuance of that request, they gave to you this written certificate?

"A. Yes, sir. I went there and asked them for that certificate."

The notices sent to Bennett & Rothrock and read in evidence, were all written, as the testimony shows, by Lipps himself and mailed to Bennett & Rothrock January 11, 1900, from South Bethlehem, Pennsylvania. First Lipps writes to the Duplan Silk Company a letter which he never sends to them but merely himself delivers to himself, wherein *he* certifies that there is just cause for the owners to terminate the contract. He then writes to Bennett & Rothrock a letter which he signs "Duplan Silk Company," and enclosed in that letter a notice to Bennett & Rothrock, which he also writes, notifying them that on January 15, 1900, the Duplan Silk Company will enter and take possession of the building for the purpose of completing the work, and further states that the contract is terminated.

This is the only notice ever received by Bennett & Rothrock, and was all done by Lipps alone, without consulting the architects, and without their knowledge. He subsequently consults the architects, and gets from them the document offered in evidence, but the evidence fails to show when this document was actually signed by the architects except that it was subsequently to the date of these notices to Bennett & Rothrock. From all that appears, it was probably subsequent to the bankruptcy.

Judge McPherson of the Circuit Court below very pertinently says, in the opinion of that court overruling the motion

for judgment *non obstante veredicto,* (Printed Record, page 39):

"This certificate is dated January 11. and, in the absence of definite evidence to the contrary, that date may be assumed to be correct, although I have no doubt that the certificate was not obtained until a later day. At all events, it was the last step in the transaction instead of the first. Pursuant to these notices, the defendant entered upon the premises, and on January 15 took possession of the material heretofore referred to, this being two days after the title of the bankrupts had passed by operation of law to their trustee.

"It must be conceded, I think, that there are serious difficulties in the defendant's path. In the first place, the express terms of article 5 makes the architects' certificate a condition precedent to the termination of the employment, and it appears by the undisputed evidence that no such certificate had been given at the time the contractors were notified that their employment had been brought to an end. It is true that Mr. Lipps professed to give such a certificate as 'overseer and contractor for the architects,' but as I have already stated, there is no evidence that he occupied this position or was authorized to act for them in such a matter. On the contrary, the clear evidence is that he was simply the general manager of the defendant and one of the overseers of the building upon its behalf. Neither, I think, can the certificate of the architects—assuming it to have been given on January 11—be properly regarded as a ratification of Mr. Lipps' previous action; for the contract, as I think, certainly contemplates that the architects shall act upon their own knowledge in giving a certificate that is to be followed by such serious consequences to the contractors while it will be observed that the architects do not profess to act upon what they themselves have observed of the contractors; failure to go on with the work, but plant themselves distinctly upon the information that is said to have been received from Mr. Lipps. It is doubtful whether such a certificate is sufficient to sustain a forfeiture of the contractors' property, and the decision of the case might perhaps be put upon this ground; but there are other difficulties that seem to be as serious, and one of them perhaps even more difficult to overcome. The 5th article of the contract, it will be noticed, provides that the company may, in a certain contingency, 'enter upon the premises and take possession for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances there-

on, and to employ any other person or persons to finish the work, and to provide the materials therefor.' This clause contemplates that the silk company might do either one of two things; it might enter upon the premises and use the material there to be found for the purpose of completing the work, or it might enter upon the premises and provide its own material for the same purpose. Now it is plain from the foregoing notices, that the declared purpose of the company is simply to 'enter and take possession of the above named premises,' and nothing whatever is said about an intention to take possession of the contractors' material. Under this ambiguous declaration, therefore, the entry might well be regarded as being simply for the purpose of providing other material and going on with the work, and I think it very doubtful whether such a notification —which must of course be strictly construed, as the purpose was to enforce a forfeiture—was sufficient to justify the silk company in taking possession of the contractors' bricks, lumber and other property on the ground."

The parties to this building contract designate the architects as the arbiters to exercise this vital and important power. Certainly the contractors did not intend to deliver this great power into the hands of the owner, the other party to the contract.

It is well settled—particularly in the law of Pennsylvania, which, that being the place of the performance of the contract, would govern its construction—that where parties submit to the arbitrament of another, matters in difference or to be in difference between them, that the person named as arbiter is alone empowered to act, and cannot delegate his power to another: *Potter vs. Sterrett, 24 Pa., 411; Wolf vs. Augustine, 181 Pa., 576.*

There was in this case no certificate from the architects, which by the terms of the contract is made a condition precedent to the right of the owner to act under the fifth article of the contract. Furthermore, the notice given by the owner to Bennett & Rohrock, was not of an intention to exercise the option authorized by the fifth article of the contract, but expressly stated that *the contract itself* was terminated. The parties themselves provide by the express language of this contract for

the mode, and the only mode, by which the owner could exercise the power of discontinuing the employment of the contractor and of taking possession of the tools and materials. Clearly the owner could exercise the power in no other mode, and in attempting to exercise it in the mode agreed upon would have to comply with the vital condition precedent, to wit, the certificate of the architect.

The learned judge of the appellate court below agrees, in his opinion reversing the judgment of the Circuit Court, with the proposition that this contract must be interpreted by its plain terms. We respectfully insist that its plain terms require that the certificate of the architect must *precede* the right of the owner of the building to take possession of the materials, and that the appellate court below in holding that the owner of the building properly exercised this power in the absence of such a certificate from the architects, and before even consulting the architects or requesting from them such a certificate, in effect made a new and different contract for the parties.

In the case of *O'Keefe vs. St. Francis Church, (1890), 59 Conn. 551*, the Supreme Court of Connecticut held:

"The contract contained a provision that in case of the refusal or neglect of the contractor to do any of the work required, the defendant, upon a certificate by the architect of such refusal or neglect, might procure the work done and charge the expense to the plaintiff (the contractor). * * * Held, That the defendant was bound by the provisions of the contract, and without a certificate by the architect of the neglect of the plaintiff in the matter, could not charge him with the extra sum paid to a mason."

In the case of *Benson vs. Miller, (1894), 57 North Western Reporter, 943*, the Supreme Court of Minnesota held:

"In a building contract, it was stipulated that, in case of the failure or unreasonable delay of the contractor to provide the necessary labor and materials to complete the work by a certain time, in the judgment of two architects named, then the other party to the contract might, after three days' notice, provide other labor and materials, and complete the work. Held, That the contractor could not be lawfully stopped from proceeding

with his work upon the judgment of said architects, where the judgment of one was based solely upon what the other had informed him, and not upon his own examination of the premises and a proper inquiry into the facts constituting such default on the part of the contractor."

We contend that this ground alone rules the case, and should reverse the judgment of the appellate court below and affirm that of the Circuit Court.

2. The notice given to Bennett & Rothrock by the owner was that the contract itself was terminated, and that on January 15, 1900, the said owner would take possession of the premises for the purpose of completing the work. It says nothing about the tools and materials. Inasmuch as the number of days' notice required by the contract was left blank, of course a reasonable number of days would be implied, and this time the owner itself fixed as January 15, 1900. It did not take possession, or intend to do so, or attempt to do so, until the 15th of January, 1900. On January 13, 1900, the title of the trustee vested.

As pointed out by Judge McPherson, in the Circuit Court below, (Printed Record, page 39):

"The 5th article of the contract, it will be noticed, provides that the company may, in a certain contingency, 'enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor.' This clause contemplates that the silk company might do either one of two things; it might enter upon the premises and use the material there to be found for the purpose of completing the work, or it might enter upon the premises and provide its own material for the same purpose. Now it is plain from the foregoing notices, that the declared purpose of the company is simply to 'enter and take possession of the above named premises,' and that nothing whatever is said about an intention to take possession of the contractors' material. Under this ambiguous declaration, therefore, the entry might well be regarded as being simply for the purpose of providing other material and going on with the work, and I think it very doubtful whether such a notification—which must of course be strict-

ly construed, as the purpose was to enforce a forfeiture—was sufficient to justify the silk company in taking possession of the contractors' bricks, lumber and other property on the ground."

In addition, any right the owner of the building may otherwise have had to take possession of these chattels, was defeated by the intervention and vesting of the title of the trustee, the representative of the creditors, on January 13, two days before such alleged right of the owner was attempted to be exercised.

There are three reported authorities directly in point: *Hawthorne vs. New Castle, etc.. Railway Co., 2 Railway Cases, 288,* also reported in *3 Queen's Bench 734; Roach vs. Great Western Railway Co., 1 Queen's Bench 51, S. C. 5 Jur. 821;* and *In Re Waugh. Ex Parte Dickin, 4 Ch. Div. 524.*

The case of Hawthorne vs. New Castle, etc., Railway Co., although reported in 3 Queen's Bench, was decided in 1840, and before the case of Roach vs. Great Western Railway Co., which was decided in 1841.

The Hawthorne case turned upon the fact that by the building contract, the contractor expressly gave to the owner a lien upon the building materials the moment they reached the bulid-ing site, which provision the court enforced. Such dicta in the Hawthorne case as might seem inconsistent with the decision subsequently rendered in the Roach case, would of course be overruled by the latter case.

In the Roach case the contract contained a clause that if the contractor should become bankrupt, or delay proceedings with the work, his employer should have power after seven days' notice to him to proceed, to employ others to do the work, that the advances made to the contractor before his default should be taken as full payment, and that all tools and materials used upon the works should become the property of the employer. The contractor, having delayed to proceed, was served, on April 11, by his employer, with notice to proceed. On April 17th, the contractor committed an act of bankruptcy; on April 19th, the notice to proceed not having been complied with, his em-

ployer took possession of the tools and material. In June a fiat was issued against the contractor. In trover by his assignees in bankruptcy against the employer for the tools and materials left upon the works by the bankrupt, it was held that they did not become the property of his employer at the expiration of the seven days' notice, because they had vested in his assignees by relation on April 17th, before the notice had expired.

The provisions of the bankrupt acts then in force in England, were not as strong in favor of the title of the assignee as are the provisions of our own bankrupt act. The provisions of the British statutes are found in *6 Geo. IV. Cap. 16, Sect. 63*, which provides,

"That the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt, wheresoever the same may be found or known, and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees, etc."

Lord Chief Justice DENMAN, in stating the decision of the Court of Queen's Bench, said, *1 Queen's Bench, 63*:

"Next it was contended for the defendants, that, even if a valid bankruptcy were established, the property in the articles sought to be recovered had passed to them by virtue of the clauses before cited; and a great deal of argument was urged, and many cases cited on both sides, for and against the validity in law of the agreement contained in them. But upon these we do not think it necessary to express any opinion; because we think, the bankruptcy having occurred on the 17th, before the bankrupts had committed any default within the meaning of those clauses before, therefore, the defendants could act upon them and take possession, the operation of them was intercepted, even if they were legally valid in their first formation. The 23d clause affects the construction of those that follow: 'If

the contractors should become insolvents, or be declared bankrupts, or be prevented from, or delayed in, proceeding,' etc., it shall be lawful for the company, if they shall think fit, to give a notice, requiring them to proceed; and if, *for seven days after, they shall make default in proceedings,* then the company may employ other workmen, and proceed themselves. The right to use the materials and tools, and the tools, and the vesting of the property in the defendants are both dependent on an election to be made by them after the default made by the contractors; and that default is the neglecting to proceed for seven days after the notice given. On the sixth day no default had been made; the defendants on that day could make no election; could not enter; the property could not vest in them; but on that day, by relation, the title of the assignees was complete. This case, therefore, falls within that of Tripp vs. Armitage, with which we agree.

"And it is probable that the clauses have been framed in this way, rather than in a more simple form by which the property should have been made to pass to the company at once in case of insolvency or bankruptcy, to avoid the questions which would have arisen on its validity with respect to the insolvent and bankrupt acts. But this case has, under the circumstances, let in the difficulty on which this case will be now decided. Here was a delay in proceeding; notice was given accordingly; and, before the term limited had expired, and the forfeiture, if we may so call it, had accrued, the goods had ceased to be the bankrupts' by the title of the assignees having intervened: the subject matter of forfeiture was therefore removed."

The contract in the Roach case was, in the essential clause, practically identical with the fifth article of the contract at bar.

In the case at bar the owner gave notice that on January 15th, he would enter and take possession. On the 13th. therefore, this right had not accrued. In the language of Chief Justice DENMAN, "before the term limited had expired, and the forfeiture, if we may so call it, had accrued, the goods had ceased to be the bankrupts by the title of the (trustee) having vested: the subject matter of forfeiture was therefore removed."

The case of *In Re Waugh. Exparte Dickin. 4 Ch. Div. 524,* turned on the construction of *sections 94 and 95 of the English Bankrupt Act of 1869, (32 and 33 Vict Cap. 71).* The provisions

of this statute differ materially from our own and from the statutes in force when the Roach case was decided, and expressly save from the operation of the bankruptcy proceedings, inter alia: Sec. 94 (3) "any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contracts or dealing, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication."

This British statute of 1869 further provides in section 95 that:

"The following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy,—

"(1) And disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise howsoever, made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of such disposition of property notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication."

These statutory differences clearly remove the Waugh case which was decided in 1876, from necessary conflict with the decision of the court of Queen's Beach in the Roach case, and likewise they destroy the effect of the Waugh case as a precedent in the case at bar. It may further be noted that no reference is made in the Waugh case, either by counsel in argument or by the court, to the said case of Roach vs. Great Western Railway Co. Either it was recognized that these statutory differences made the Roach case inapplicable, or else the decision of the court proceeded in ignorance of the decision in the Roach case. It is further to be noted, that the decision of the Waugh case was by one judge alone, to wit, Bacon, the chief judge in bankruptcy, and has been discredited, if indeed its authority was not destroyed in the case of *Exparte Jay. In Re Harrison, 14 Ch. Div. 19*, decided in 1879 by the court of ap-

peals, in which the judgment of Bacon, chief judge in bankruptcy, is reversed and the Waugh case questioned. See also in this connection the case of *Exparte Black. In Re Walker, 26 Ch. Div. 510.*

We therefore contend, that the Roach case is the best considered and the authoritative precedent, and that taken in connection with the language of our bankrupt act, and of the unquestionable fact that the creditors of Bennett & Rothrock could on January 13th have levied upon the chattels in question as the property of Bennett & Rothrock, should be decisive in favor of defendant in error.

As against these authorities, there were cited, in the courts below, for the defendant in error, the cases of Garrett vs. Salisbury Railway, Law Reps., 2 Equity, 358; Blake vs. Izard, 16 Weekly Reports 108; Brown vs. Bateman, 15 Weekly Reps. 350; Banbury & Cheltenham Direct Railway Co. vs. Daniel, 33 Weekly Reports 321; and Ex Parte Newitt, Law Reps., 16 Ch. Div. 522.

The case of Garret vs. Salisburg Railway is wholly inapplicable, no question of bankruptcy was involved, and the whole question at issue was the *value* of the property taken; Blake vs. Izard was a case in which the owner of the land was held to have acquired title to chattels which had become affixed to the freehold; Brown vs. Bateman was decided upon the express ground that the chattels had become affixed to the freehold; and Banbury & Cheltham Direct Railway vs. Daniel involved no question in bankruptcy, but turned upon the fact that the materials which the contractor sought to remove from the premises of the Railway had become the Railway's property by being expressly included in certificates by the engineer to the contractor of the amount due him by the Railway. The case of *In Re* Newitt. decided in 1880, like the case of *In Re* Waugh, *supra,* is wholly inapplicable, because it turned upon the terms of the British bankrupt statute, expressly charging the property of the bankrupt in the hands of his assignee with his contracts with respect to its disposition, and the court expressly called at-

tention to the fact that different statutory provisions would have required a different decision.

SECOND. The United States Circuit Court of Appeals below ruled this case upon the ground that the trustee in bankruptcy was bound where the bankrupts would have been bound, and that by the spirit, even though not by the express terms, of the building contract, it was the intention of the parties that the owner of the building should have a qualified property and inchoate title in the tools and building materials the moment the same reached the site of the building operations, and which thus prevented the same from vesting in the trustee in bankruptcy.

At the outset of the consideration of this doctrine, it should be borne in mind that the Bankrupt Act of 1898 contains entirely different provisions from those of any prior national bankrupt act, with respect to the title in the property of the bankrupt which shall vest in the trustee in bankruptcy. In all prior national bankrupt acts, the assignee was in a sense the representative of the bankrupt and merely the successor to the bankrupt in the title to the property; while under the Bankrupt Act of 1898, the trustee in bankruptcy is peculiarly the representative, not of the bankrupt, but of his creditors, and is expressly clothed with a title as superior to that of the bankrupt as may be the rights of any creditor of the bankrupt.

The only respect in which by the bankrupt act of 1867 the title of the assignee rose higher than that of the bankrupt, was by virtue of the provision in the fourteenth section of that act conferring upon the assignee title to "all the property conveyed by the bankrupt in fraud of his creditors."

The Bankrupt Act of 1898 provides in the seventieth section:

"SECTION 70. Title to property.—a. The trustee of the estate of the bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of

the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: * * * and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

It is also provided in the same section of the act of 1898:

"(e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

It is also provided in section sixty-seven of the act of 1898, clause e, *inter alia*, as follows:

"And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the law of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

It is also provided in section sixty-seven, clause a, of the act of 1898:

"SECTION 67. LIENS. (a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

It thus becomes clear that the criterion for determining the rights and title of the trustee in bankruptcy under the act of 1898, is not found in the question, What were the rights and title of the bankrupt? but rather in the question, What were the rights of the bankrupt's creditors?

In view of these entirely different provisions of the Bankrupt Act of 1898, the authorities construing the title taken by the assignee under the bankrupt act of 1867, cited by the learned Judge of the United States Circuit Court of Appeals below and upon which he expressly based the decision of that court in this case, are wholly inapplicable: Stewart v. Platt, 101 U. S. 731; So. Branch Lumber Co. v. Ott 142 U. S. 622; Yeatman v. Sav. Inst., 95 U. S. 764; Cook v. Tullis, 18 Wall. 341; Hauselt v. Harrison, 105 U. S. 401.

As illustrative of the inapplicability of these decisions under the prior act. is the case of *Stewart v. Platt, 101 U. S. 731*, which decides that a chattel mortgage, void for want of proper recording as against judgment creditors of the bankrupt, was nevertheless valid as against the assignee under the act of 1867; while the act of 1898 expressly provides that the trustee shall take title to "property which might have been levied upon and sold under judicial process against" the bankrupt, and that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

The case of South Branch Lumber Co. v. Ott, 142 U. S. 622, cited by appellate court below, did not arise under any national bankrupt act. and has no applicability.

In the case of *Yeatman v. Savings Institution, 95 U. S. 764*, the assignee claimed to recover from a bank two certificates of indebtedness of the state of Louisiana which the bankrupt had, some time before his bankruptcy, in good faith and regular course of business delivered in pledge to the bank for a present valuable consideration, to secure the payment of a note discounted in consideration of such pledge by the bank. This court, basing its decision upon the law of Louisiana, where the transaction took place, held, that the pledge, valid as against the world under the law of Louisiana, was not in fraud of the bankrupt act of 1867, and that the assignee could not recover. This decision has no even remote bearing upon the case at bar, except that it is an instance of the application of the rule, con-

tended for by the plaintiff in error, that the law of the state in which the transaction took place, should determine its effect as against creditors of the bankrupt.

In the case of *Cook v. Tullis, 18 Wall. 341*, a banker had the custody of a bond of a client, for which he exchanged a mortgage of then substantially equal value, which exchange was ratified by his client. The banker subsequently becoming bankrupt, his assignee sought to recover the mortgage from the client, which this court held could not be done, the transaction having taken place before the bankrupt's insolvency and not being a preference within the provisions of the bankrupt act of 1867, and this court further say:

"And the test is, as already indicated, could the parties have made the transaction at the time of the ratification without contravening the provisions of the bankrupt act?"

The application of this test to the case at bar, will make it difficult to reconcile the claim of title set up by the defendant in error with the provisions of the Bankrupt Act of 1898 quoted above.

The cases of Hauselt v. Harrison, 105 U. S. 401, and Chattanooga Nat. Bank v. Rome Iron Co. 102 Fed. 755, cited by the appellate court below will be discussed *infra*.

It is contended for the plaintiff in error: 1. That any transfer of the chattels in controversy to the defendant in error, or any claim or lien thereon or property therein set up by the defendant in error, were fraudulent and void as agianst the creditors of the bankrupt; and 2. That the chattels in controversy were, at the time of the adjudication of the bankrupts, subject to be levied upon and sold by the creditors of the bankrupts by judicial process against them under the laws of Pennsylvania.

1. The witness, Lipps, (printed record, page 28), testified to a sum of money advanced to Bennett & Rothrock by the silk company, and while he expressly admitted that this advance was upon the promise of the contractors to speed the building operations and upon their statement that unless they received

the advance they would be put into bankruptcy, he yet tries to convey the inference that the advance was also made upon the security of the building materials which the contractors had upon the ground. This advance was made in December, within one month before the adjudication in bankruptcy.

This transaction could not have constituted a pledge, for there was no delivery of possession nor specific designation of the things pledged. To constitute a valid pledge there must be an actual or symbolical delivery of possession of the thing pledged, and to preserve the pledge, the pledgee must retain possession of the property: *Christian v. Atlantic & North Carolina R. Co., 133 U. S. 241*; *22* American and English Encyclopædia of Law, Second Edition, page 853, and cases cited there in note 6. While the witness, Lipps, testified that the contractors argued that the silk company would be safe in making the advance by reason of the large amount of building materials on the ground, yet it is not even hinted that any agreement, either express or implied, was made in consideration of the advance with reference to these materials, and the only inference which could possibly be drawn from the whole testimony on this subject, is, that the contractors called the attention of the silk company to the large amount of building materials upon the ground as an evidence of the ability of the contractors to carry out their promise to speed the building operations if the advance were made to them.

The point which we desire here to emphasize and enforce, is, that any lien or claim or property of whatsoever nature given by Bennett & Rothrock either at this time or at any other time to the Duplan Silk Company upon or in the chattels in controversy, was a constructive fraud, and void as against their creditors, under the laws of Pennsylvania, by reason of the fact that possession of these

chattels remained in Bennett & Rothrock, and so continued until they were adjudged bankrupt.

Section 721 of the revised statutes of the United States provides:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply."

In the cases of *Yeatman v. Savings Institution, 95 U. S. 764, and Cook v. Tullis, 18 Wall. 341,* which were suits brought by assignees in bankruptcy under the bankrupt act of 1867 against strangers to the bankruptcy proceedings to recover property which they claimed as assets of their respective benkrupt's estates,—which, as pointed out *supra* is the only respect in which they bear any resemblance to the case at bar,—it was held by this court that the above quoted section of the revised statutes applied in so far as to make the laws of the respective states in which the transactions in controversy in those cases took place, rules of decision in this court for the determination of such of the legal rights of the parties as were not determined by the provisions of the then bankrupt act. And see *Balkam v. Woodstock Iron Co., 154 U. S. 178.*

It is therefore contended that the laws of Pennsylvania must be consulted in determining whether the title set up by the defendant in error to the chattels in controversy is fraudulent and void as against the creditors of whom the plaintiff in error is the representative, whether, if any transfer of such chattels took place, it was in fraud of creditors, whether the claim of defendant in error, if in the nature of a lien or inchoate title, was for any reason invalid as against such creditors, and whether the chattels in controversy might have been levied on and sold by the creditors by judicial process against the bankrupts.

It is the well settled law of Pennsylvania, under the statute *of 13 Elizabeth cap. 5*, and an unbroken line of decisions of the Supreme Court of the state from the case of *Clow v. Woods, 5 Serg. & Rawle (1819), 275*, to the case of *Barlow v. Fox, (1902), 203 Pa. 114*. that any transfer or conveyance of the title in chattels, whether inchoate or complete and whether qualified or absolute, and any mortgage or lien of any nature whatever upon chattels, unaccompanied by open, exclusive and continued possession of the chattels in the vendee, mortgagee, or party having other claim, is, entirely irrespective of the motives or purposes of the parties, a constructive fraud and void as against creditors. As additional cases enforcing this rule may be cited, among the host of others, Welsh v. Bekey, 1 Pen. & Watts 57; Young v. McClure, 2 Watts & Serg. 147; Stark v. Ward, 3 Pa. 328; Steelwagon v. Jeffries, 44 Pa. 407; Pounder v. Foos, 1 Walker 27; Dewart v. Clement, 48 Pa. 413; Crowley v. Irvin. 1 Pennypacker 227; Shaeffer v. Zech, 14 Atlantic Reporter 405; Prickett v. Jones, 4 Rawle 260.

In the case of Barlow v. Fox, (1902), 203 Pa. 114, the Supreme Court of Pennsylvania, in the opinion by FELL, J., page 118:

"But there has been no deviation from the general rule that delivery of possession is indispensable to transfer a title by the act of the owner, that shall be valid against creditors. In Clow v. Woods, 5 S. & R. 275, which is said by Judge SHARSWOOD in McKibben v. Martin, 64 Pa. 352, to be 'the magna charta of our law on the subject,' it was decided that there is no difference in the application of the rule between absolute sales and contingent sales or mortgages, and that as to both the retention of possession when actual delivery is practicable, is a fraud in law. In Jenkins v. Eichelberger, 4 Watts 121, GIBSON, C. J., said: 'To tolerate a lien severed from the possession by any device whatever, would be pregnant with all the mischiefs of colorable ownership; and to sanction it at the expense of the community could be justified but by the accomplishment of more important objects than individual accommodation.' These decisions have been followed in numerous cases which it is needless to cite. In a review of the cases in this state by the American editors of 1 Smith's Leading cases, page 78, it is said: 'That mortgages

are within the rule has been expressly decided; and it is now established in Pennsylvania, as a general principle of law, that by no device whatever, whether of sale and agreement of resale, or by the title at the time of the purchase being vested in one who is a surety for the purchaser who takes possession, can a lien be created on personal property separate from the possession of it. The delivery must be actual and not merely symbolical where actual delivery is practicable, and if it is not practicable the parties should leave nothing undone to secure the public from deception.'"

In the case of McKibbin v. Martin, 64 Pa. 352, the Supreme Court of Pennsylvania say, per SHARSWOOD, J., page 357:

"Whenever the subject of the sale is capable of an actual delivery, such delivery must accompany and follow the sale to render it valid against creditors. * * * * * But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer. * * * In such cases it is only necessary that the vendee should assume the control of the subject so as reasonably to indicate to all concerned the fact of the change of ownership."

The case of Hauselt v. Harrison 105 U. S. 401, was dwelt upon at length in the appellate court below as furnishing the *ratio decidendi* of the case at bar. In the Hauselt case, Bayer, who was adjudged a bankrupt January 18, 1875, made on May 29, 1874, a written contract with Hauselt whereby Hauselt advanced him money to buy skins to be tanned and to be then cosingned to Hauselt—and that "all skins * * * shall be considered as security for the refunding, with interest, of all moneys advanced" by Hauselt, and that the skins should be kept insured. The place of performance of this contract was the state of Pennsylvania. On November 6, 1874, Bayer having advised Hauselt that he was in failing health and finances, a new written agreement was made between them whereby *Hauselt took im-*

mediate possession of the skins in controversy, and completed tanning them. After Bayer's bankruptcy on January 18, 1875, his assignee sued Hauselt in trover for damages for the alleged conversion of the skins. Here, it would seem, is a case in many respects like that at bar. The Supreme Court of the United States say in the Hauselt case, per Mr. Justice MATTHEWS, 105 U. S. 405:

"The legal effect of such a contract, it was decided in Gregory v. Morris, 96 U. S. 619, was to create a charge upon the property, not in the nature of a pledge, but of a mortgage. *Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely.*"

The italics are inserted by counsel.

It was consequently held, *there having been an actual change of possession more than two months before the bankruptcy*, the assignee could not recover. It was further held, that had there been no such change of possession, the assignee would have taken the skins, but subject to the mortgage of Hauselt, there being no provision in the bankrupt act of 1867 conferring upon the assignee in such a case any higher title than that of his bankrupt.

The case of Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. 755, decided in the U. S. Circuit Court for the Northern District of Georgia, involved a pledge of personal property originally made by the bankrupt long before his insolvency. The pledge was treated as a mortgage, and was urged to be void against the trustee in bankruptcy because not recorded. Neither counsel nor court seem to have had their attention called to Section 67, paragraph a of the Bankrupt Act of 1898, that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate;" and the court expressly based its decision upon the decisions under the

bankrupt act of 1867. The U. S. District Court for the Southern District of Georgia has correctly interpreted the Bankrupt Act of 1898 just the other way, and held, in the case of *In Re* Gosch, 9 Am. Bankr. Reports, 610, that an unrecorded conditional sale of chattels, void as against creditors under the laws of Georgia, was void as against the trustee in bankruptcy. To the same effect: *In Re* Fraizer, (U. S. Dist. Court. W. D. of Mo.) 9 Am. Bankr. Reports 21; *In Re* Legg, (U. S. Dist. C. D. of Conn.), 96 Fed. 326; *In Re* Leigh, 96 Fed. 806.

In the case of *In Re* Legg, 96 Fed. 326, Judge TOWNSEND of the U. S. Dist. Court, District of Connecticut, in holding that a conditional sale of chattels not registered as required by the laws of Connecticut, was void against the trustee in bankruptcy, quotes the provisions of the Bankrupt Act of 1898 hereinbefore quoted at length and says:

"These provisions are not found in the law of 1867. I am therefore of the opinion that the alleged title of claimant is not valid against the estate of the bankrupt, and that the trustee has greater rights than the assignee had under the act of 1867, and has the right to said property."

In the appellate court below, counsel for the present defendant in error cited and emphasized the following extract from Hare on Contracts, page 397:

"Agreeably to the Roman law a contract of sale did not pass the right of property until the goods were delivered to the purchaser or subject to his dominion and control. It results from this doctrine, as logically applied in Scotland, that merchandise which has been not only sold but paid for may be taken in execution by the vendor's creditors down to the last moment before delivery, and the purchaser left to seek redress in an action to recover back the price, which in the case of an insolvent vendor will generally prove illusory. The common law rule is the direct opposite—that where the price is fixed and the subject matter ascertained with an intent to pass the right of property, the law will carry the purpose into effect although the purchase money has not been paid or the goods delivered. And as this rule meets the requirements of business life, it has been adopted not only in England and the United States, but in countries which, like France and Holland, follow the principles of the

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civil law. Agreeably to the Code Napoleon the sale is complete between the parties, and the property is acquired in law by the purchaser with regard to the seller, as soon as the thing and the price are agreed on, though the thing has not been delivered or payment made."

This extract is from the chapter on "Sale of Specific Goods," and does not treat at all of the rights of creditors as against the vendee, but wholly of the effect of the sale in passing title as between the vendor and vendee.

The case of "The Poconoket," 70 Fed. 640, was also cited in the courts below, which was a case of a contract for the sale of a vessel in course of construction, in which it was held that title remained in the builders until completion and delivery. It will be observed that this controversy concerned the title to the vessel, the thing being built, and not to the materials which were to be used in its construction; and could have no even remote bearing upon the questions at bar.

The learned Judge of the United States Circuit Court of Appeals below recognized the force of the contention in this case that the claim of the present defendant in error is fatally defective by reason of the possession of the chattels in controversy having remained in the bankrupts, and says, (Printed Record, pages 52, 53):

"We disagree, also with the position taken by the learned Judge of the court below, in regard to the effect of the oral agreement of December 16th, when he says: 'Even assuming however, that a contract of pledge was actually made, it would be ineffective, because no possession was ever taken by the Silk Company under the contract, and therefore if under such circumstances any lien could be said to exist, it would be a secret lien, and, like the privileges reserved under the 5th Article, would also be stricken down by the Pennsylvania law in favor of other creditors.'

"What we have already said, as to the effect of the delivery by the contractor of the materials upon the premises of the Silk Company, in giving it a possession that would protect the lien which we think was intended to be created by the parties in their general

contract, and especially in the 5th Article of the supplemental agreement, is applicable to the proposition of the learned Judge, just quoted. There is no intimation in the testimony that, if this oral agreement was a distinct and independent pledge, it was not, to use the language of Section 67 (d) of the Bankrupt Act, 'given or accepted in good faith, and not in contempaltion of or in fraud upon this act and for a present consideration.' The only question, then, is the one upon which the court below expressed itself in the opinion just quoted, to wit, that there was no sufficient delivery or change of possesion, to deprive the transaction of the character of a secret lien, as denounced by the law of Pennsylvania in that behalf, in favor of attaching creditors and therefore of the trustee in bankruptcy. The intention to pledge being clear, and the consideration being substantial and adequate, what other act was necessary, to give the requisite possession to avoid the mischiefs aimed at by the law of Pennsylvania, as founded on the Statute of Elizabeth? The materials were already on the land and premises of the company, for the purpose of being incorporated into the building. Could that possession, in pursuance of the pledge, be made more notorious and open by moving them away and bringing them back or by removing them to other land of the Silk Company? We think not. Goods pledged or conveyed, while so situated, are within none of the mischiefs of the statute of frauds, and can be the occasion of no deception to a creditor of the contractor, any more than if fully incorporated into the building, in which case, no assertion of a right in a creditor to attach is suggested."

This, with all due respect we insist, entirely loses sight of the undisputed facts: that the contract between the parties for the erection of this building was recorded, and contained no provision for the rights and claims which the defendant in error seeks to enforce by virtue of a supplementary, secret and unrecorded contract ; that no overt acts whatever to effect a change of possession were performed ; that the chattels in controversy, by the undisputed evidence, were shipped to Hazleton and there delivered by the material-men and present creditors to Bennett & Rothrock, and remained so in their possession until their bankruptcy. Why was not this secret contract recorded, unless to keep the knowledge of its

provisions from those who on the sole credit of Bennett & Rothrock were selling and delivering these materials to them?

When and in what way was there ever any delivery of these chattels by Bennett & Rothrock to the Duplan Silk Company, or any visible or actual change of the possession of them which Bennett & Rothrock had?

It may be suggested that the carrying of these materials by Bennett & Rothrock to the site of the building operations was a delivery of the possession of them to the Duplan Silk Company. But it should be considered that the possession which the silk company had of the building premises was but the constructive possession of the owner of the land; and that the actual possession for the purposes of constructing the building was in the contractors. If the carrying of the materials to the site of the building operations, *ipso facto* worked a change of their title and possession, the provisions of the 5th Article of the secret contract were superfluous. The words thereof, that in the contingency therein provided for, the owner should be at liberty "*to enter upon the premises and take possession*, for the purpose of completing the work comprehended under the contract, of all materials, tools and appliances thereon," as the contract of the parties, expressly interprets their intentions. and are inconsistent with any intention that the carrying of the materials to the site of the operations should alone work a change of the possession.

The reasoning of the learned appellate court below overlooks the cardinal requirement of the laws of Pennsylvania, that the vendee or mortgagee, to avoid the claims of creditors, must take the *exclusive* possession of the chattels.

The law, running through all of the Pennsylvania decisions, is thus well stated by Judge SHARSWOOD in the case of McKibbin v. Martin, 64 Pa. 352, cited *supra*, on page 359:

"But the law undoubtedly is, that not only must possession be taken by the vendee, but that possession must be exclusive of the vendor. A concurrent possession will not do. 'There cannot in such case,' said Mr. Justice DUNCAN, 'be a concurrent

possession; it must be exclusive, or it would by the policy of the law be deemed colorable;' Clow v. Woods, 5 S. & R. 287. And again, in Babb v. Clemson, 10 Id. 428: 'There can not be a concurrent possession in the assignor and assignees; it must be exclusive. or it is deemed colorable and fraudulent. To defeat the execution, there must have been a bona fide substantial change of possession. It is mere mockery to put in another person to keep possession jointly with the former owner. A concurrent possession with the assignor is colorable.' But what is the concurrent possession which will be deemed such as a matter of law? Evidently as owner, or accompanied with the ordinary *indicia* of ownership—such as will lead any person not in the secret to infer that there has been no actual change. The vendor must appear to occupy the same relation to the property as he did before. In such a case, the court must pronounce it fraudulent and colorable *per se*."

Neither, in view of the undisputed facts, could the defendant in error be said to have been a bona fide holder for value of these chattels prior to the date of the adjudication, within the meaning of paragraph e, of section 70 of the act of 1898, for the very obvious reason, among others, that it was not prior to that date a *holder* of the chattels at all.

Judge McPherson of the Circuit Court below, bred a Pennsylvania lawyer and Judge, and thoroughly familiar with the whole trend of the Pennsylvania decisions, very aptly says, (Printed Record, page 40):

"But in addition to these difficulties, there is the more serious objection, that even if the silk company is to be regarded as having correctly attempted to exercise a privilege reserved to it by the contract, nevertheless that privilege cannot be successfully invoked against the title of the trustee in bankruptcy. It is urged by the company, that the title of the trustee is no greater than the title of the bankrupts; and that, as the privilege reserved by the 5th article of the contract could undoubtedly have been enforced against the bankrupts themselves, it is enforceable against the trustee also. It is no doubt true, speaking generally, that under section 70 a the trustee takes no better title to the property than the bankrupt himself possessed; but there are exceptions to this statement, as plainly appears from other provisions of the act. Under certain circumstances the

trustee is the representative of the creditors rather than of the bankrupt, in relation to the property of the estate, and he may unquestionably exercise rights, and enforce a title, that the bankrupt himself could neither enforce nor exercise. For example, with regard to property that the bankrupt has fraudulently transferred, the trustee may undoubtedly recover it for the estate, although it is also undoubted that the bankrupt himself could not undo his own fraudulent transactions. So also, it is provided by the act, in Section 67, clause a—and this closely concerns the subject now in hand—that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." Whatever may be the character of the right, or the privilege, reserved to the defendant company by the 5th article of the contract, it cannot be more binding upon the bankrupt estate than if it were a lien, and it may, therefore, properly be treated as if that were its true nature. Under the law of Pennsylvania, as repeatedly declared by its highest court, it is beyond controversy that this right to take possession of the bankrupts' material could not have been enforced against other creditors of the bankrupt, seeking to enforce their own claims by appropriate legal process. If, for example, another creditor of the bankrupts had obtained judgment against them and had levied upon the property in question, the silk company could not have defeated the execution by attempting to exercise its right to take possession of the bankrupts' material. Secret liens against property are obnoxious to the law of Pennsylvania, and at the best the privilege now sought to be invoked by the silk company was a secret lien, and not made known to the public by being put upon record—indeed, there is no provision of law for recording such contracts—and not actually disclosed to the creditors so far as appears from the testimony now before the court. I think, therefore, it is clear that the trustee under Section 69a is entitled to invoke the aid of the law of Pennsylvania to prevent the enforcement of this privilege, although the bankrupts themselves might not have been allowed so to do; and if the Pennsylvania law upon this subject is applicable, there can be no doubt that the defence now under discussion is unavailing.

"The second defence only needs a few words. It was proved, that in December, 1900, the bankrupts applied to the silk company for an advance of money, and that the company advanced them $15,000 more than the contract required, believing—so it

was testified by Mr. Lipps—that the material upon the ground was sufficient security for this sum. It is urged that this transaction was equivalent to a pledge of this material, and therefore that the company was justified in taking possession of it in repayment of the advance. The testimony, in my opinion, does not justify such a conclusion. It does not show that a contract of pledge was made between the bankrupts and the company; but, at the most, only shows that the company probably believed that, if the contractors should get into difficilties, there was enough material on the ground that could be taken possession of by the company under the 5th Article to reimburse the sum advanced. Even assuming, however, that a contract of pledge was actually made, it would be ineffective. because no possession was ever taken by the silk company under the contract, and therefore if under such circumstances any lien could be said to exist, it would be a secret lien, and, like the privileges reserved under the 5th Article, would also be stricken down by the Pennsylvania law in favor of other creditors."

We respectfully contend that this should be conclusive of the controversy.

Respectfully submitted,

THOMAS M. B. HICKS,
WILLIAM H. SPENCER,
For Plaintiff in Error.

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JAMES H. McKENNEY,
Clerk

No. 83. October Term, 1903.

Supreme Court of the United States.

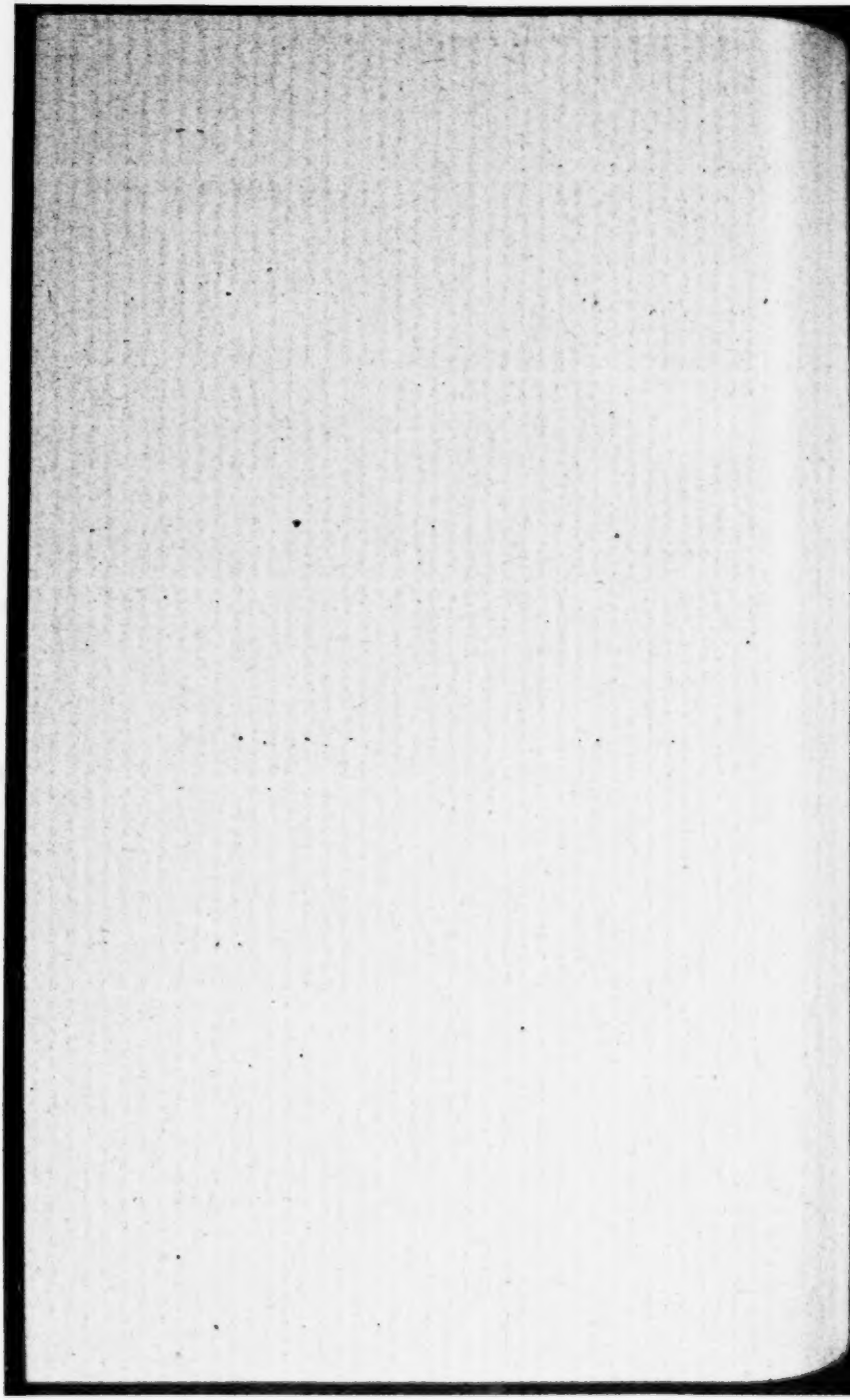
W. H. Spencer, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, Plaintiff in Error,

vs.

Duplan Silk Company, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR *SUR* MOTION TO DISMISS WRIT OF ERROR.

WM. JAY TURNER,
RICHARD C. DALE,
For Defendant in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

W. H. Spencer, Trustee in Bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, Plaintiff in Error,

vs.

Duplan Silk Company, a corporation organized and existing under the laws of the State of New York, Defendant in Error.

October Term, 1903.

No. 83.

MOTION TO DISMISS WRIT OF ERROR.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF SAID COURT:

And now comes the defendant in error and moves the court to dismiss the writ of error herein for the following reasons, to wit:—

That this court is without jurisdiction to entertain this writ of error because the only ground upon which the Circuit Court originally had jurisdiction was diversity of citizenship between the parties.

The action was begun by the plaintiff in error in the Court of Common Pleas for the County of Lehigh and State of Pennsylvania, on October 18th, 1900, by the issue a writ of summons in trespass, followed by the filing of a dedication in trover, charging the defendant with the conversion of certain lumber. No Federal question was disclosed in the record as it stood in the State court.

Thereafter, to wit, on November 19th, 1900, the Duplan Silk Company, defendant in error, presented its peti-

tion to the said Court of Common Pleas of Lehigh County for the removal of the record of said cause to the Circuit Court of the United States for the Eastern District of Pennsylvania, alleging as ground for said removal that the controversy in this suit is wholly between citizens of different States. A copy of said petition is found at page 10 of the transcript of the record of this cause in your Honorable Court.

Upon consideration of said petition and the filing of a bond as required by the laws of the United States, the said Court of Common Pleas of Lehigh County ordered and decreed that the record in this suit be removed to the Circuit Court of the United States for the Eastern District of Pennsylvania.

On March 19th, 1901, the defendant in error filed in the Circuit Court of the United States for the Eastern District of Pennsylvania an exemplification of the record of said suit as the same existed in said Court of Common Pleas of Lehigh County, and thereafter, on April 23d, 1901, filed a plea of "Not guilty" to the declaration theretofore filed in said cause.

On November 11th, 1901, a jury was called to determine the issue joined as aforesaid, and on November 11th, 1901, the jury found for the plaintiff, and assessed the damages at $12,183. Before said jury, the contention of the plaintiff in error was that said lumber and building materials were his property as trustee in bankruptcy of James V. Bennett and Samuel W. Rothrock, whereas the defendant in error contended that said lumber and building materials were its property by virture of the provisions of a certain contract between the defendant in error and said Bennett and Rothrock.

On January 15th, 1902, a motion by the defendant for judgment *non obstante veredicto* was overruled, and judgment was entered upon the verdict in favor of the plaintiff, and on January, 24th, 1902, the defendant in error filed in said Circuit Court of the United States its petition for writ of error, which writ was duly allowed and was thereafter duly prosecuted in the United States Circuit

Court of Appeals for the Third Circuit, which court on May 7th, 1902, entered a judgment in said case reversing the judgment of the said United States Circuit Court in and for the Eastern District of Pennsylvania, and remanding the cause, with instructions to enter judgment for the defendant upon the verdict.

Defendant in error is advised, verily believes, and so avers, that said judgment of the United States Circuit Court of Appeals is a final judgment from which the plaintiff in error is not entitled to a writ of error from your Honorable Court, for the reason that the jurisdiction of the Circuit Court of the United States in and for the Eastern District of Pennsylvania attached in this cause solely and exclusively by reason of the diversity of citizenship between the parties hereto, and not by reason of the existence of any of the questions enumerated in section 5 of the Act of Congress approved March 3d, 1891, as questions upon which a writ of error may be had from your Honorable Court.

WM. JAY TURNER,
RICHARD C. DALE,
Attorneys for Duplan Silk Company, Defendants in Error.

CITY AND COUNTY OF NEW YORK, *ss.*

Henry Schnakenberg, being duly sworn according to law, deposes and says that he is the treasurer of the Duplan Silk Company, the defendant in error in the above-entitled case, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information, and belief.

H. SCHNAKENBERG.

Sworn to and subscribed before me, this nineteenth day of September, A. D. 1903.

W. D. DESPARD,
Notary Public No. 28.

[SEAL]

(Certificate of county clerk attached.)

BRIEF OF ARGUMENT *SUR* MOTION TO DISMISS WRIT OF ERROR.

The defendant in error asks for the dismissal of the writ of error in this case by virtue of the provisions of sections 5 and 6 of the Act of Congress approved March 3d, 1891, which sections are as follows:—

"SEC. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:—

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

"From the final sentences and decrees in prize causes.

"In cases of conviction of a capital or otherwise infamous crime.

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

"Nothing in this Act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

"SEC. 6. That the Circuit Court of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law.

"And the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties

to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

"Excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought for review by writ of error or appeal.

"And excepting also, that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

This action was commenced by the present plaintiff in error in a court of the Commonwealth of Pennsylvania, in which court he filed a declaration averring in substance that on January 13th, 1900, certain lumber and building materials were the property of the firm of Bennett & Rothrock, and that by virtue of an adjudication of bankruptcy on that date, he succeeded to the title of said firm in said materials, and that on January 15th, 1900, the present defendant in error wrongfully and injuriously converted said lumber and building materials to its own use. This declaration sets forth no matter raising any controversy under the Constitution, laws, or treaties of the United States. If on January 13th, 1900, the lumber and building materials in question belonged to the firm

of Bennett & Rothrock, the plaintiff in error necessarily succeeded to the title of that firm by virtue of the adjudication of bankruptcy.

Before the time had arrived for the defendant in error to plead to this declaration, the case was removed from the State court to the Circuit Court of the United States upon a petition by the present defendant in error, alleging that the controversy between the parties was wholly between citizens of different States. After the removal of the case, the defendant in error joined issue with the plaintiff in error upón the question of trover and conversion.

Whatever legal questions may have been incidentally involved in the issue of fact thus joined, there was certainly at the time of removal no ground for the Federal courts to take cognizance of the case except that the parties thereto were citizens of different States.

A verdict and judgment having been rendered against the defendant in error in the Circuit Court of the United States, a writ of error was obtained by the defendant in error and duly proceeded with under section 6 of the Act of Congress approved March 3d, 1891, in the Circuit Court of Appeals. In accordance with this Act of Congress, there was no other appellate court to which the defendant in error could apply for the correction of any errors that may have been committed by the Circuit Court. At that stage of the proceedings, as at the commencement of the action, the record indicated no controversy between the parties involving either—

First.—The jurisdiction of the Circuit Court.

Second.—A final sentence and decree in a prize cause.

Third.—A conviction of a capital or otherwise infamous crime.

Fourth.—The construction or application of the Constitution of the United States.

Fifth.—The constitutionality of any law of the United States or the validity or construction of any treaty made under its authority.

Sixth.—The contravention of the Constitution of the United States by the Constitution or laws of a State.

Consequently, under the provisions of the Act of Congress above mentioned, no writ of error could be prosecuted before this court.

The Circuit Court of Appeals having reversed the judgment of the Circuit Court, the present plaintiff in error seeks to have this court, upon writ of error, review this action of the Circuit Court of Appeals in so doing. The present writ of error must therefore be prosecuted under section 6 of the Act of March 3d, 1891, for the reason that the record discloses no controversy between the parties such as under section 5 of that Act would have permitted an appeal directly from the Circuit Court to this court. But section 6 of that Act expressly provides that the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States.

This court has on numerous occasions since the creation of Circuit Court of Appeals by the Act of March 3d, 1891, dismissed writs of error or appeals in equity where, as in this case, the courts of the United States were resorted to solely by reason of the diversity of citizenship of the parties litigant.

The leading case upon the question of practice herein involved is Colorado Central Consolidated Mining Company *vs.* Turck, 150 U. S., 138, in which a complaint was filed in a Circuit Court of the United States averring, as ground for the exercise of the Federal jurisdiction, that the plaintiff and defendant were citizens of different States. After a verdict and judgment in the Circuit Court, the case was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit, where the judgment was affirmed. After a petition for rehearing had been denied by the Circuit Court of Appeals, a writ of error was allowed to the Supreme Court. The case being submitted on motion to dismiss or affirm, this court, speaking by Mr. Chief Justice Fuller, dismissed the writ of error upon the grounds—

First.—That this court exercises appellate jurisdiction only in accordance with the Acts of Congress upon that subject.

Second.—That by the Judiciary Act of March 3d, 1891, judgments or decrees of the Circuit Courts of Appeals are final in all cases in which the jurisdiction is dependent entirely upon the diverse citizenship of the parties.

Third.—That this court, in the exercise of its appellate power, denies the jurisdiction of courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called to act.

Fourth.—That in a case where the jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, the inquiry into its jurisdiction is limited to that time; and the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which suggests a Federal question.

This decision was rendered on November 6th, 1893, and was followed on January 21st, 1895, by the decision in the case of Rouse, Receiver, *vs.* Letcher, 156 U. S., 47, where it was held that in order to maintain that a decision by a Circuit Court of Appeals was not final it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States, and that this rule was in nowise affected by the fact that after the Circuit Court had acquired jurisdiction by reason of the diverse citizenship of the parties, a third party was permitted to intervene, but the jurisdiction of the Circuit Court over such intervening controversy is to be ascribed to the same grounds as jurisdiction in the main suit.

In the case of Borgmeyer, Adr., *vs.* Idler, 159 U. S., 408, the jurisdiction of the Circuit Court was invoked by the issue of a summons, followed by the filing of a statement of claim or declaration, from which it appeared that the suit was one of which cognizance could properly be taken on the ground of diverse citizenship, and from which it did not appear that jurisdiction was rested or

could be asserted on any other ground. As in the case at bar, a verdict was rendered for the plaintiff in the Circuit Court, and subsequently a motion for judgment *non obstante veredicto* was overruled. The defendant thereupon took the case on error to the Circuit Court of Appeals, which reversed the judgment of the Circuit Court and entered judgment for the defendant, notwithstanding the verdict on the points of law reservd at the trial. A writ of error to this court having been allowed, the cause came on on a motion to dismiss or affirm, when this court, again speaking by Mr. Chief Justice Fuller, and quoting largely from his opinion in the case of Colorado Central Consolidated Mining Company *vs.* Turck, *supra*, dismissed the writ of error. The court, speaking by Mr. Chief Justice Fuller, said:—

"In Colorado Cent. Consol. Min. Co. *vs.* Turck, 150 U. S., 138, we held that when the original jurisdiction of a Circuit Court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked; and that when the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case. It was there said:—

" 'By the Judiciary Act of March 3d, 1891, it is provided that the review by appeal, by writ of error, or otherwise, from existing Circuit Courts, shall be had in this court, or in the Circuit Court of Appeals thereby established, according to the provisions of the Act regulating the same. The writ of error in this case was brought under section 6 of that statute, which provides that "judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or contro-

versy being aliens and citizens of the United States or citizens of different States," and also that "in all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1000 besides costs. 26 Stat. at L., 826, 828, section 6, chapter 517. If the judgment of the Circuit Court of Appeals for the Eighth Circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States."'

"Applying these principles to the case at bar, it is apparent that this writ of error will not lie. The jurisdiction of the Circuit Court was invoked by the issue of summons of September 15th, 1892, followed by the filing of the statement of claim or declaration September 22d, 1892, and therefrom it appeared that the suit was one of which cognizance could properly be taken on the ground of diverse citizenship, and it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground.

"By the fifth section of the Act of March 3d, 1891, appeals or writs of error from the District and Circuit Courts of the United States to this court were allowed, among other cases, 'in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question,' but it was not suggested in the summons and statement of claim, that the validity or construction of any treaty made under the authority of the United States was drawn in question, and no such question was decided either by the Circuit Court or the Circuit Court of Appeals. It is unreasonable to contend that any question was raised directly touching the validity or construction of either of the treaties of Venezuela by plaintiff's statement of claim or by clear and nec-

essary intendment therefrom, and, under the rule laid down in Turck's case, this writ of error must be dismissed. The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this court from the Circuit Court, the writ of error could not have been entertained."

In the case of Carey *vs.* Railway Company, 161 U. S., 115, the rule above stated as to the finality of judgments or decrees entered in the Circuit Courts of Appeals in cases brought into Circuit Courts of the United States solely by reason of the diverse citizenship of the opposite parties, was held to extend to a case where the Circuit Court had jurisdiction of a foreclosure suit only upon the ground of diverse citizenship and subsequently a suit was brought to vacate the decree therein for collusion and fraud. It was held that the suit to vacate the decree was an ancillary suit and a continuation of the main suit, and therefore the jurisdiction of the Circuit Court over the proceeding to vacate the decree rested on the jurisdiction over the main suit, and depended entirely upon diverse citizenship, and the decree of the Circuit Court of Appeals in the ancillary suit was final under the Act of March 3d, 1891, section 6, and an appeal therefrom could not be taken to this court.

In the case of Press Publishing Company *vs.* Monroe, 164 U. S., 105, the complaint in the Circuit Court showed that the parties were citizens of different States and did not claim under or even mention the Constitution or laws of the United States. At the trial the plaintiff relied wholly upon a common-law right, although the defendant invoked the Constitution and laws of the United States. Nevertheless the judgment of the Circuit Court of Appeals was held to be final, and the writ of error was dismissed for want of jurisdiction. The Court, speaking by Mr. Justice Gray, concisely stated the law governing appeals in cases of which the Federal Courts take cognizance, as follows:—

"Of suits of a civil nature, at law or in equity, the Circuit Courts of the United States have original jurisdiction, by reason of the citizenship of the parties, in cases between citizens of a State and aliens; and by reason of the cause of action, in cases arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority,' including, of course, suits arising under the patent or copyright laws of the United States. Act of August 13th, 1888, chapter 866, 1 (25 Stat. at L., 433); Rev. Stat., 629, Clause 9. In order to give the Circuit Court jurisdiction of a case as one arising under the Constitution, laws, or treaties of the United States, that it does so arise must appear from the plaintiff's own statement of his claim. Colorado Cent. Consol. Min. Co. *vs.* Turck, 150 U. S., 138; Tennessee *vs.* Union & P. Bank, 152 U. S., 454; Oregon S. L. & U. N. R. Co. *vs.* Skottwe, 162 U. S., 490; Hanford *vs.* Davies, 163 U. S., 273.

"From final judgments of the Circuit Court in civil suits, an appeal or writ of error lies to this court, or to the Circuit Court of Appeals. It lies directly to this court in any case in which the jurisdiction of the Circuit Court is in issue; and in such case the question of jurisdiction only is certified to and decided by this court. It also lies directly from the Circuit Court to this court in cases involving the construction or application of the Constitution, or the constitutionality of a law, or the validity or construction of a treaty, of the United States, or in which the Constitution or a law of a State is claimed to be in contravention of the Constitution of the United States; and in any of these cases the appellate jurisdiction of this court is not limited to the constitutional question, but extends to the determination of the whole case: Act of March 3d, 1891, chapter 517, section 5 (26 Stat. at L., 827, 828); Horner *vs.* United States, 143 U. S., 570; Chappell *vs.* United States, 160 U. S., 499.

"From final judgments of the Circuit Court in all other civil suits an appeal or writ of error lies to the Circuit Court of Appeals and the judgments rendered thereon by

the Circuit Court of Appeals are final (unless this court, by writ of *certiorari* or otherwise, orders the whole case to be brought up for its decision), in all cases in which the jurisdiction of the Circuit Court 'is dependent entirely upon the parties being aliens and citizens of the United Sates, or citizens of different States'; as well as in cases arising under the patent laws, or under the revenue laws. In all other civil actions (including those arising under the copyright laws of the United States), if the matter in controversy exceeds $1000, besides costs, there is, as of right, an appeal or writ of error to bring the case to this court. Act of March 3d, 1891, chapter 517, section 6.

"This plaintiff in error, having been defeated in the Circuit Court, did not bring the case directly to this court as one involving the construction or application of the Constitution of the United States, or upon any other of the grounds specified in section 5 of the Act of 1891. But it took the case, under section 6, to the Circuit Court of Appeals, and having been again defeated in that court, now claims, as of right, a review by this court of the judgment of the Circuit Court of Appeals.

"The judgment of the Circuit Court of Appeals being made final in all cases in which the jurisdiction of the Circuit Court is dependent entirely upon the parties being citizens of different States, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds $1000, the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United States, or was one in which the jurisdiction of the Circuit Court wholly depended upon the parties being citizens of different States.

"The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2000, showed that the Circuit Court had jurisdiction of the case by reason of the parties being citizens of different States. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United

States, or in any way mention or refer to that Constitution or to those laws; and at the trial she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing consideration, and as was expressly adjudged in Colorado Cent. Consol. Min. Co. *vs.* Turck, 150 U. S., 138 (37; 1030), is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals.

"The jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different States, the judgment of the Circuit Court of Appeals was final, and the writ of error must be dismissed for want of jurisdiction."

In the case of *ex parte* Jones, 164 U. S., 691, a petition was presented to this court for a writ of mandamus to the Circuit Court of Appeals for the First Circuit to allow an appeal to this court from a decree of that court affirming, or a decree of the Circuit Court for the District of Massachusetts dismissing, a suit brought by Charles F. Jones against the Merchants' National Bank of Boston. The original bill averred the complainant to be a citizen of Pennsylvania, and the defendant to be a National bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. The petition for *mandamus* was denied for the reason that section 4 of the Act of Congress, approved August 13th, 1888, denies to National banks the privilege of suing or being sued in the Circuit and District Courts of the United States, except in cases where diversity of citizenship would authorize an action to be brought, and that consequently, the proceeding instituted by Jones was entitled to the cognizance of the Federal Courts, solely by reason of the diverse citizenship of the parties, and therefore in accordance with the decision in Colorado Central Consolidated Mining Company *vs.* Turck, *supra*; and Borgmeyer

vs. Idler, *supra*, the decree of the Circuit Court of Appeals must be held to be one from which an appeal would not lie to the Supreme Court.

On February 24th, 1902, the case of Hugely Manufacturing Company *vs.* Galeton Cotton Mills, 184 U. S., 290, was decided by this court on motion to dismiss appeal. The proceeding was one to foreclose a corporation mortgage, and was originally brought in a Circuit Court of the United States by a citizen of Alabama against certain citizens of Georgia. After a decision by the Circuit Court, an appeal was taken to the Circuit Court of Appeals and from the decree of that court an appeal was allowed to this court. Pending this appeal this court granted a *certiorari sur* diminution of record, and in consequence thereof the omissions in the record were supplied. The court was unable to find in the record any ground on which the appeal could be sustained. Mr. Chief Justice Fuller, after citing the Act of March 3d, 1891, and referring to several decisions including that of Colorado Central Consolidated Mining Company *vs.* Turck, *supra*, said:—

"The general intention of the Act was to distribute the appellate jurisdiction, and to permit an appeal to only one court.

"Robinson *vs.* Caldwell, 165 U. S., 359.

"In this case appellants did not attempt to take an appeal directly to this court from the Circuit Court, nor could they have done so since no question was so raised as to bring the case within either of the classes named in section 5. Cornell *vs.* Green, 163 U. S., 75. The ground on which the jurisdiction of the Circuit Court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the Circuit Court of Appeals cannot be regarded otherwise than as made final by the statute.

"The question before us is, Whether this appeal was properly granted and can be maintained. In all cases where the decree or judgment of the Circuit Court of Appeals is made final by the statute an appeal does not

lie, but any such case may be brought here 'by *certiorari* or otherwise.' The latter words add nothing to our power, for if some other order or writ might be resorted to, it would be *ejusdem generis* with *certiorari*. The writ is the equivalent of an appeal or writ of error as declared by the statute, and it is issued in the discretion of the court.

"The record filed in this case, June 25th, 1900, was entirely insufficient, and appellants applied for *certiorari* to perfect it by bringing up the alleged lacking portions. We granted that application, and the omissions were supplied. This auxiliary writ did not operate to bring the case before us or in itself to add any support to the appeal, which must stand or fall according as the statute did or did not allow it to be taken. Many matters are urged, such as alleged lack of indispensable parties below, and so on, as reasons why an appeal ought to lie, but our jurisdiction depends on the statute and cannot be enlarged by the supposed hardship of particular cases."

The right of the defendant in error to have the present writ of error dismissed plainly appears from a consideration of the consequences of a failure upon its part to remove the case from the State court to the United States court. Had the present defendant in error pleaded to the declaration of the plaintiff in error in the Court of Common Pleas of Lehigh County, State of Pennsylvania, the issue thereby raised would have been precisely the same as that which was determined by the jury in the Circuit Court of the United States for the Eastern District of Pennsylvania. Assuming that the jury in the State court had found, as did the jury in the Federal court, that the present defendant in error was guilty of trover and conversion, and that judgment had been entered upon such a verdict in favor of the present plaintiff in error, the case would then have gone to the Supreme Court of Pennsylvania, which is the highest court of that State. That court, like the Circuit Court of Appeals, would have reviewed the pleadings and the evidence in the case and have entered such judgment as it deemed proper under the circumstances. It is submitted,

however, that whatever judgment the Supreme Court of Pennsylvania might have entered, no ground would have existed for the removal of the record from that court by writ of error to this court.

Had the Supreme Court of Pennsylvania rendered a judgment in favor of the present plaintiff in error there could surely have been no ground upon which the defendant in error could have had such judgment reviewed by this court, for the reason that such a judgment would not have drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, or the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; nor would the record have disclosed any title, right, privilege, or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, specially set up or claimed by either party. It is upon these grounds alone that a judgment or decree of the highest court of a State may be brought before this court for review.

Revised Statutes of the United States, Section 709.

Had the Supreme Court of Pennsylvania, like the Circuit Court of Appeals, rendered a judgment in favor of the present defendant in error, the same answer would have been given to an attempt by the plaintiff in error to have such judgment reviewed by this court.

It is true that the rights of the plaintiff in error are in some respects based upon the Act of Congress relating to bankruptcy, approved July 1st, 1898, but as any decision which the highest court of Pennsylvania might have rendered in this case could by no possibility deny the validity of that Act of Congress or deny any right claimed under it, there certainly could not have been present in the record a Federal question upon which either party would have been entitled to a writ of error to review the action of that court.

Missouri Pacific Railroad Company *vs.* Fitzgerald, 160 U. S., 556.

The only connection which the Act of Congress relating to bankruptcy has to this case, in whatever forum it had been brought to final judgment, is in the matter of its application to the facts herein developed. As above stated, if the lumber and materials alleged to have been converted were, on January 13th, 1900, the property of the firm of Bennett & Rothrock, then by virtue of the provisions of said Act, the plaintiff in error succeeded to the title of the firm of Bennett & Rothrock to this lumber and building material. It will therefore be readily seen that the validity of the Bankruptcy Act was in no wise questioned, and the case falls within the rule laid down in Cameron vs. United States, 146 U. S., 533, that this court will not review a judgment of the highest court of a State in a case where no question is raised as to the validity of a statute of the United States, but merely the application of the statute to the facts of the case is involved.

WM. JAY TURNER,
RICHARD C. DALE,
For Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

W. H. Spencer, Trustee in Bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, copartners, trading as Bennett & Rothrock, Plaintiffs in Error,

vs.

Duplan Silk Company, a corporation organized under the laws of the State of New York, and a citizen thereof, Defendant in Error.

October Term, 1903.

No. 83

BRIEF OF DEFENDANT IN ERROR.

As stated in the opinions both of the Circuit Court and the Circuit Court of Appeals, there is no substantial dispute as to the facts in this case. They are succinctly set forth by Gray, J., in the opinion of the Circuit Court of Appeals, as follows:—

> "Bennett & Rothrock were builders, and as such entered into a written contract with the Duplan Silk Company, bearing date August 30th, 1899, to erect a silk mill for the defendant at Hazleton, Pa., providing all materials and performing the work mentioned in the specifications and shown in the drawings prepared by the architect. By this contract it was provided that the sum to be paid by the owner to the contractor for said work and materials should be $76,000, payable in installments as the work progressed to certain specified stages, the first installment being $5000, and the remaining ones $10,000

each. On the same day, a supplemental contract, according to the form of contract recommended for general use by the American Institute of Architects, was executed between the parties.

"About December 15th, 1899, when the excavations and foundation walls and piers had been completed, and the brick wall partly built, work on the building was lagging. Although, according to the terms of the contract, only the first installment of $5000 had become due, and it had been paid, Rothrock, one of the contractors, came to Emory J. Lipps, general manager of the Duplan Silk Company, and through whom, as its agent, the building contract was made, and asked whether certain moneys could not be advanced beyond what the contract called for. Lipps told him that, personally, he could not advance any money, but that if he presented his case to the board of directors of the Duplan Silk Company, they might be willing to do so. Accordingly, on December 16th, there was a meeting in New York City between Rothrock and those representing the company, at which Rothrock stated that he was very short of money, and that unless he could get some from the company in advance, he could not pay for the material he had ordered, and the men would put him into bankruptcy. They had already made him a payment of $5000, and no other installment was then due. The testimony of Lipps as to the transaction between the parties proceeds as follows:—

" 'We had a meeting in New York City, and upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him $15,000, he would at once go to work and complete the building. Of course he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money. We knew that material was there, and we

consequently gave him the $15,000. That was on December 16th.

"'Q. So the amount you had paid to the 15th of December was $20,000, although he was entitled to but $5000?

"'A. Yes, sir; he was entitled to $5000 when the excavations were done, and $10,000 when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him $5000, and we advanced him $15,000 more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground.'

"After this money was advanced, work was continued for a short time, and by Christmas, or a day or two thereafter, it was practically abandoned. On the 13th of January, 1900, Bennett & Rothrock, on their own petition, were adjudicated bankrupts, and W. H. Spencer, defendant in error, was duly appointed and qualified as trustee of their estate. The chattels in controversy were scheduled among their assets, and there were numerous judgments against them, and executions issued thereon, when the petition was filed and the adjudication made.

"On January 11th, 1900, certain letters from the Duplan Silk Company were sent to and received by Bennett & Rothrock, and, as they appear in the record, are as follows:—

"'South Bethlehem, January 11, 1900.

"'*Messrs. Bennett & Rothrock, Williamsport, Pa.*

"'Gentlemen:—We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill building at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on

Monday, January 15th, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

"'Yours truly,

"'DUPLAN SILK COMPANY,

"'E. J. LIPPS,
"'*General Manager.*'

"'SOUTH BETHLEHEM, January 11, 1900.

"'*Duplan Silk Company, New York City, N. Y.*

"'I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building, in course of construction at Hazelton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with said Duplan Silk Company, under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided for therein.

"'E. J. LIPPS.'

"'SOUTH BETHLEHEM, January 11, 1900.

"'*Messrs. Bennett & Rothrock, Williamsport, Pa.*

"'DEAR SIRS:—Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazelton.

"'Yours truly,

"'DUPLAN SILK COMPANY.'

"It is admitted by counsel for plaintiff in error that these letters were intended to be pursuant to the fifth article of the supplemental contract, which provides as follows:—

"'ART. 5. Should the contractor at any time re-

fuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties.'

"On January 15th the plaintiff in error took exclusive possession of the building materials and tools, which constitute the property in controversy in this action, and which had been brought upon the prem-

ises by Bennett & Rothrock for the purpose of being incorporated in the mill, for the building of which they were contractors. The plaintiff in error then proceeded to use the materials in the erection of the building, upon which Bennett & Rothrock had defaulted. Thereafter, Spencer, defendant in error, as the trustee of the bankrupt estate, demanded from the plaintiff in error these materials. The demand was refused; whereupon this action of trover for the recovery of the same was commenced by the said trustee."

The legal conclusions drawn from these facts by the learned judge before whom this case was tried are fully set forth, with his reasons therefor, in his opinion refusing the motion of the defendant in error for judgment *non obstante veredicto*. (Transcript of Record, pages 36 to 41.) The error underlying his judgment, as clearly pointed out in the opinion of the Circuit Court of Appeals (Transcript of Record, pages 45 to 53), consisted of an assumption that at the date when Bennett & Rothrock abandoned work under their contract with the defendant, the property in these chattels was without qualification in Bennett & Rothrock, and starting with this erroneous assumption, the case of the defendant in error was treated as resting upon its ability to enforce a forfeiture of the contractors' property.

See Transcript of Record, page 39, where, referring to the certificates in evidence as the basis of defendant's title, the trial judge said:—

> "It is doubtful whether such a certificate is sufficient to sustain a forfeiture of the contractors' property, and the decision of the case might perhaps be put upon this ground."

His opinion then proceeded to discuss critically the fifth article of the contract and to suggest that the silk company might, under this clause, do either one or two things. It might enter upon the premises and use the ma-

terial there to be found for the purpose of completing the work, or it might enter upon the premises and provide its own material for the same purpose; and then construed the notice given as only evidencing an intent to enter and take possession of the premises without taking possession of the material, resting this limited construction of the notice upon the ground that the notice must be strictly construed "as the purpose was to enforce a forfeiture."

In reversing the judgment entered in accordance with this opinion in the Circuit Court, the Circuit Court of Appeals, speaking through Gray, J., said:—

> "The learned judge of the court below regarded the notices given by the owner to the contractor on the 11th of January, and the subsequent taking of possession, on the 15th of January, of the materials brought on the premises by the contractor for the purposes of the building as proceedings to enforce a forfeiture under article 5 of the supplemental contract, and as such to be strictly construed. Taking this view of the character of the provisions of said article 5, he decided that there had not been such a strict compliance by the owner with the requirements of said article 5 as to entitle it to claim a forfeiture, and that the unqualified and absolute property in the materials in question passed to the trustee of the bankrupt contractor on the date of the adjudication of the bankruptcy. It was on this view, principally, that the judgment was entered which was equivalent to peremptory instructions to the jury to find for the plaintiff. On the undisputed facts, however, of this case, we think there was fundamental error in the position thus taken by the court below.
>
> "We do not think that the notices given by the owner, on the 11th of January, and the certificate of the architects on the same day, or the taking exclusive possession of the materials on the ground, on the 15th of the same month, are to be regarded as

steps to enforce a forfeiture, nor that the right reserved to the owner under article 5 of the supplemental contract is to be held as a stipulation to that effect.

"The contract between the parties, contained in said article 5, is to be construed by its plain terms. So construed, it provides a particular mode by which the owner of the premises may enforce the general security, evidently intended to be given him, by the materials brought on to the ground by the contractor, and appropriated by him for the purposes of the building under contract. In this we discover no features of a technical forfeiture. The strictness with which it is sometimes said that a contract involving forfeiture must be construed is not applicable here. The stipulation is to be neither strictly nor loosely construed, but must be dealt with so as to fairly effect the meaning of the parties, as expressed by the language they have used in their contract. There is in the provision that the owner may, in case of default by the contractor, proceed to finish the building himself, and to that end use materials brought by the contractor on the ground for the purposes of the building, no suggestion of loss of property to the contractor, by way of punishment or penalty. On the contrary, the stipulation carried out under the circumstances described would tend to minimize the loss that would otherwise accrue to the contractor from his own default.

"Looking, then, at article 5 to discover the intention of the parties as to this stipulation, we think it is clearly apparent to have been that the materials brought by the contractor upon the premises and appropriated to the building contracted for, should be considered as so far delivered into the possession of the owner as to make them a security for the advances made by the owner. A *quasi* or qualified right of property in these materials by the owner of the soil, and a possession not inconsistent with the

builder's right and duty to incorporate them in the building, would thus result from their delivery by the contractor on the premises and their appropriation to the construction of the building.

"In this view of the case, we are not here concerned with the question whether the plaintiff in error precisely complied with all the requirements of article 5 in taking steps to make effectual the security furnished by the materials brought by the contractor on the ground. The general contract as to this matter must be taken to mean something, and it would be of little avail to say that the plaintiff in error can take the steps prescribed in article 5 to make this security available, if the materials themselves could be taken away, as claimed by defendant in error, by the execution of a creditor or the action of a trustee in bankruptcy. The effect of the whole contract between the parties, including article 5 of the supplemental contract, in whatever terms it may be described, was to affix to the materials brought upon the ground and appropriated to the building by the contractor, a charge or interest in favor of the plaintiff in error, consistent with the qualified ownership of the defendant in error, but commensurate with the requirement that they should furnish security to the plaintiff in error for the performance of the contract and for advances made.

"The special oral agreement of December 16th, 1899, as set forth in the testimony of Mr. Lipps, general manager for the plaintiff in error, which is not contradicted or disputed, may be taken as a specific appropriation of the materials at that time delivered on the premises of plaintiff in error as security for the advances then made, freed from the requirements of notice and certification by the architect, contained in the fifth article of the supplemental agreement; and as making effective and available at once the inchoate lien or title of the plaintiff in error to said materials. In other words, by this oral

agreement, the qualified possession of these materials by plaintiff in error, was made immediate and unqualified. The security originally intended by the parties was perfected as to the advances then made.

"Nor in this view of the mutual rights of the parties given, can it be contended that this oral agreement of December 16th, 1899, was an unlawful preference, in fraud of the bankrupt law. It was not a new and independent contract, but a recognition of the old contract, and in furtherance and consummation of its intent. A mortgagor, who puts his mortgagee in the actual and unqualified possession of the chattels mortgaged, instead of compelling him to take the formal steps for a foreclosure, is acting in furtherance of the original contract, not making a new one, in the sense that would, in this case, transgress the inhibition of the bankrupt law as to preferential conveyances.

"Unquestionably, the defendant in error could not have been held to challenge the legal and binding effect of this contract, as above described; but their counsel now contend that, even though it be good between the parties, their immediate representatives and volunteers, this contract cannot bind third parties without notice, and that *bona fide* judgment creditors could have levied upon and sequestered the materials herein in question, unaffected by the contract, even though admitted to be binding between the parties. And if creditors could have so attached the property, free from any claim on the part of the plaintiff in error, then it is argued that, under the provision of section 70 of the bankrupt law, which gives to the trustee any property which might have been levied upon and sold in judicial process against the bankrupt, the unqualified property in these materials vested in the trustee. The Statute of Elizabeth, as in force in Pennsylvania, is invoked to declare illegal against creditors a conveyance, pledge, or charge of property, unless accompanied by delivery or

change of possession, and the court below, taking this view, relies upon section 67, clause (*a*) of the bankrupt law, which provides that 'claims which, for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate.'

"In order to arrive at this result, it is assumed that the property in question could have been levied upon and sold under judicial process against the bankrupt, either generally or because there was no possession in the plaintiff in error, that would make good its claim against creditors of the bankrupt. But this assumption is not warranted. The goods delivered by the contractors upon the premises, for the purpose of being built into the structure contracted for, were sufficiently in the possession of the owner of the premises to protect the lien, claimed as the result of the understanding between the parties of the contract. They were in the possession of the owner of the freehold as fully as they could be, consistently with the right of the contractor to incorporate them in the building. In this respect, this case differs from those cited by defendant in error, in which the materials furnished by the contractor, and in litigation between the parties, were in the exclusive possession of the contractor, never having been delivered upon the premises of the owner. Materials delivered, as in this case, are notoriously to all the world in the qualified possession and ownership of the owner of the freehold, and the creation of a lien or charge, or the making of a conveyance, would not require, or indeed be susceptible of, any further delivery or change of possession, in order to take the case out of the mischiefs of the Statute of Frauds.

"To merely say that these materials could have been levied on by judgment creditors of the bankrupt, and thus bring them within the description con-

tained in section 70 of the bankrupt law, of property that, upon the adjudication of bankruptcy, passed to the the trustee of the bankrupt, is begging the question. These materials would not, in our opinion, after their delivery on the premises by the contractor, have been liable to such a seizure, for the reasons that we have already stated.

"The situation of the parties, as the result of the contract between them, was such that the contractor could have made no disposition of this property inconsistent with his obligations under the contract, and he could have been prevented in equity, by injunction, from so doing; and equally so could a creditor have been prevented from asserting a right of seizure inconsistent with the interest of the plaintiff in error. In this respect, we think the case is quite within the *ratio decidendi* of Hauselt *vs.* Harrison, 105 U. S., 401, 407. The trustee in bankruptcy, seeking by proceeding in law to enforce the title of the bankrupt to personal property so situated, will be subject to all legal and equitable claims of others which exist against the bankrupt not in fraud of the bankrupt law or the rights of general creditors.

Hauselt *vs.* Harrison (*supra*);
Cook *vs.* Tullis 18 Wall., 341;
Yeatman *vs.* Sav. Inst., 95 U. S., 739;
Stewart *vs.* Platt, 101 U. S., 739;
South Branch Lumber Co. *vs.* Ott, 142 U. S., 622;
Chattanooga Nat. Bk. *vs.* Rome Iron Co., 102 F. R., 755.

"The law of the contract as we view it, supports the claim of the plaintiff in error that the right of the owner was a specific contractual right conferred upon it by the original agreement between the parties, and that the subsequent action of the owner in acceding to the request of the contractor for an

advance of $15,000 upon the faith of the materials delivered upon the ground, confirmed and made certain the right of the owner upon the subsequent default of the contractor to enforce the original contractual right and to apply the materials to the use to which they had been specifically appropriated by the contractor in delivering them on to the premises of the owner for use in fulfilling the contract.

We disagree, also, with the position taken by the learned judge of the court below in regard to the effect of the oral agreement of December 16th, when he says: 'Even assuming, however, that the contract or pledge was actually made it would be ineffective, because no possession was ever taken by the silk company under the contract, and therefore, if under such circumstances any lien could be said to exist, it would be a secret lien, and like the privileges reserved under the fifth article, would also be stricken down by the Pennsylvania law in favor of other creditors.'

"What we have already said as to the effect of the delivery by the contractor of the materials upon the premises of the silk company, in giving it a possession that would protect the lien which we think was intended to be created by the parties in their general contract, and especially in the fifth article of the supplemental agreement, is applicable to the proposition of the learned judge just quoted. There is no intimation in the testimony that if this oral agreement was a distinct and independent pledge it was not, to use the language of section 67 (*d*) of the Bankrupt Act 'given or accepted in good faith, and in contemplation of or fraud upon this Act and for a present consideration.' The only question, then, is the one upon which the court below expressed itself in the opinion just quoted, to wit, that there was not sufficient delivery or change of possession to deprive the transaction of the character of a secret lien, as denounced by the law of Pennsyl-

vania in that behalf, in favor of attaching creditors, and therefore of the trustee in bankruptcy. The intention to pledge being clear and the consideration being substantial and adequate, what other Act was necessary to give the requisite possession to avoid the mischiefs aimed at by the law of Pennsylvania as founded on the statute of Elizabeth? The materials were already on the land and premises of the company for the purpose of being incorporated into the building. Could that possession, in pursuance of the pledge, be made more notorious and open by moving them away and bringing them back or by removing them to other land of the silk company? We think not. Goods pledged or conveyed, while so situated, are within none of the mischiefs of the Statute of Frauds, and can be the occasion of no deception to a creditor of the contractor, any more than if fully incorporated into the building, in which case no assertion of a right in a creditor to attach is suggested.

"On the whole case, therefore, we think the learned judge of the court below erred in not granting defendant's motion for judgment, notwithstanding the verdict. The judgment below is therefore reversed wth directions to enter one in favor of the defendant."

A consideration of the character of the contract between the Duplan Silk Company and the firm of Bennett & Rothrock will demonstrate the correctness of the views of the Circuit Court of Appeals and the fundamental error of the position taken by the present plaintiff in error.

The law relating to the transfer of title where the contract is a mere contract of sale is stated with great felicity in Hare on Contracts, page 397:—

"Agreeably to the Roman law a contract of sale did not pass the right of property until the goods were delivered to the purchaser or subject to his

dominion and control. It results from this doctrine, as logically applied in Scotland, that merchandise which has been not only sold but paid for may be taken in execution by the vendor's creditors down to the last moment before delivery, and the purchaser left to seek redress in an action to recover back the price, which in the case of an insolvent vendor will generally prove illusory. The common-law rule is the direct opposite—that where the price is fixed and the subject matter ascertained with an intent to pass the right of property, the law will carry the purpose into effect although the purchase money has not been paid or the goods delivered. And as this rule meets the requirements of business life, it has been adopted not only in England and the United States, but in countries which, like France and Holland, follow the principles of the civil law. Agreeably to the Code Napoleon the sale is complete between the parties, and the property is acquired in law by the purchaser with regard to the seller, as soon as the thing and the price are agreed on, though the thing has not been delivered or payment made."

Where the contract is not a simple contract for the sale of a chattel in *esse*, but for the making or constructing of an article to be finished by one contracting party, the question of when title passes is to be determined by the court in accordance with the intention of the contracting parties.

This subject received full consideration in the case of "The Poconoket," 70 Fed. Rep., 640, in which the very learned opinion of Judge Butler, 67 Fed. Rep., 262, was affirmed in the Circuit Court of Appeals. In that case it was held that the mere fact that in a contract for the sale of a vessel payments were to be made by installments, as the work progressed, did not evidence an intent to vest a title in the purchaser, but that the court in each case were required to look at all the terms of the contract and discover the real intent of the parties, and

that if, upon the face of the writing, no intent was evidenced, it was competent to show by parole that a verbal agreement had been made before the execution of the contract that the title should pass when the work was commenced. In this case there is a full review of all the authorities.

In the present case, while it might be admitted that the mere provision for payment on account of the purchase price by installments, as the work progressed, did not evidence any conclusive intent to pass the title as against the contractors, but only to relieve the contractors from the obligation to completely finish the work provided for by the contract as an entirety before receiving a portion of the price, the eleventh article does clearly indicate an intent to give the owner an interest not only in the partially completed structure, but also in all materials in or about the premises:—

> "ART. XI. The owner shall, during the progress of the work, maintain full insurance on said work, in his own name and in the name of the Contractor, against loss or damage by fire. The policies shall cover all work incorporated in the building and all materials for the same in or about the premises, and shall be made payable to the parties thereto, as their interest may appear. The premium on said insurance to be paid one-half by the owner, the other half by the Contractors."

While the provision for the payment of the premium on this insurance is arbitrarily fixed at one-half thereof to each, the loss under the policy, if any, is made payable to either party as their interest may appear.

In the present case, following the ruling *in re* "Poconoket," that parole evidence is admissible to show an agreement supplementing the contract, upon this subject, it is proper to call attention once more to the testimony of E. J. Lipps (Transcript of Record, pages 28 and 29), where it appears that Rothrock, one of the contractors, obtained payments in advance of the time prescribed by

the written contract, upon statements which were accepted and acted upon by the defendant corporation, and which clearly evidenced an intent to vest in the defendant corporation a title in the materials upon the ground at least sufficient to protect them in their advances.

"Accordingly we had agreed upon a meeting in New York. Mr. Rothrock was present, and he presented his case saying that he was very short of money, and unless he could get some money from us in advance he could not pay for the material he had ordered, and the men would put him into bankruptcy. We should therefore advance him money beyond what the contract called for.

* * * * * * *

"We had a meeting in New York City, and upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him $15,000, he would at once go to work and complete the building. Of course, he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money. We knew that material was there, and we consequently gave him the $15,000. That was on December 16th.

* * * * * * *

"Q. So the amount you had paid to the 15th of December was $20,000, although he was entitled to but $5000?

"A. Yes, sir; he was entitled to $5000 when the excavations were done, and $10,000 when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him $5000, and we advanced him $15,000 more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground."

* * * * * * *

This special and new arrangement for the advance of $15,000 prior to the time when it was payable under the contract, and the securing the same by a lien upon the materials delivered, in nowise contradicted the written contract, indeed, it was but the development of the inchoate right of the owner conferred in article 5 of the written contract, which has already been quoted in full. By that clause the owner, as part of the original contract, obtained the right, in case of the default of the contractor, to use the materials placed on the ground by the contractor for the fulfillment of the contract.

This right was not in the nature of the forfeiture of any property right of the contractor, but really in aid of the contractor, because thereby the claim for damages which the owner would have against the contractor would be reduced. It was an intelligent and business-like arrangement to reduce damages to the contractor in case of his failure, and in nowise a forfeiture. If the contract had provided that the goods might be taken as forfeited, with the privilege to the owner to sue for damages suffered in consequence of the default, without making any allowance for the materials thus taken, the court could properly regard it as a forfeiture, but in the form in which the contract gave the right to the owner, the parties provided the best method of reducing the damage consequent upon the failure of the contractor. The clause therefore is one which should be enforced in aid of its reasonable intent, and any judgment which is based upon the thought that it should be strictly construed as a clause involving a forfeiture, is based upon a fundamental error.

The defendant in error therefore claims that the right of the owner was a specific contractual right conferred upon it by the original agreement between the parties, and that the subsequent action of the owner in acceding to the request of the contractor for an advance of $15,000 upon the faith of the materials delivered upon the ground, confirmed and made certain the right of the owner upon the subsequent default of the contractor to enforce the original contractual right and to apply the materials to

the use to which they had been specifically appropriated by the contractor in delivering them on to the premises of the owner for use in fulfilling the contract.

This case is much stronger for the owner than was the title of the defendants in the case of Hauselt *vs.* Harrison, 105 U. S., 401. That was an action of replevin by Harrison, assignee in bankruptcy of Bayer, against Hauselt and Korn, to recover possession of certain tanned skins, part finished and part unfinished, and bark. In that case, on May 29th, 1874, Bayer and Hauselt entered into an agreement under which Hauselt advanced to Bayer moneys for the purchase of skins to be tanned and finished by Korn, Bayer agreeing upon the finishing of the tanning to send the skins to Hauselt for sale upon commission; the agreement further provided that the skins purchased under the agreement, whether green or in process of tanning, should be construed as security for the moneys advanced. The business continued until November 6th, 1874, when a further agreement was executed, reciting that Bayer was ill and unable to complete the tanning of the skins then on hand in tannery, and authorized Hauselt to take possession of the same. Hauselt took possession of the tannery and four days after, on November 10th, Bayer filed a petition in bankruptcy, whereupon his assignee brought replevin for the skins. The court charged the jury in substance as follows:—

> "That the property in the skins purchased by means of the advances under the contract of May 29th, 1874, was in Bayer; that Hauselt had no right to the possession of them at any time while they were in the process of manufacture; that the only security given by the contract was the personal obligation of Bayer to consign them to Hauselt for sale, when the manufacture was complete; that the contract of November 6th, 1874, and the possession delivered and taken in pursuance of it, was a transfer to which Hauselt was not entitled, and constituted a preference within the meaning of the bankrupt

law; that if it was made to make and obtain payment of the whole of the debt to Hauselt, Bayer being in fact insolvent, and Hauselt having reasonable cause to believe him to be so, the transaction was fraudulent and void, and the verdict should be for the plaintiff."

There was a verdict in favor of the assignee. Upon writ of error this judgment was reversed. The opinion of this court, by Mr. Justice Matthews, contains the following:—

"Notwithstanding the difference between the contract of May 29th, 1874, between Bayer and Hauselt, and the contract considered by this court in the case of the Powder Co. *vs.* Burkhardt, 97 U. S., 110 it must be conceded that the legal title to the skins purchased with the money advanced by Hauselt vested in Bayer. But it was not an unqualified property. We cannot agree with the Circuit Court in the construction that the only security given to Hauselt by the contract was the personal promise of Bayer that he would perform it. To limit the contract to that extent is to deprive its last provision of all force; for, without it, the personal obligations to deliver the skins when tanned would still remain. The clause providing for security must be held to mean something, and it declares that the skins themselves, before delivery of possession to Hauselt under the contract, for purposes of sale shall be considered as security.

"The legal effect of such a contract, it was decided in Gregory *vs.* Morris, 96 U. S., 619, was to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely.

"Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauselt, and a court of equity would not have hesitated by an injunction to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee, fraudulently dealing with and misappropriating trust property, and Hauselt would be protected in his rights, as owner of a beneficial interest in the property, entitled to the enjoyment of the specific fruits of the agreement."

This quotation is instructive. Can it be doubted, that as between these parties, the contractors and this defendant in error as the owner of the property, a court of equity, upon the application of the owner, would have enjoined the contractors from removing from the premises of the owner the materials placed thereon under the terms of the contract, and upon the faith of which the owners had made an advance payment, had the contractors undertaken themselves, after having received such advances, in disregard of the rights of the owner, to have removed these materials? That the trustee in bankruptcy who seeks, in a proceeding at law, to enforce the title of the bankrupt will be subject to all the limitations which exist as against his assignor is shown, by a further quotation from the same opinion:—

"If, in consequence of his bankruptcy, the property had come into the possession of his assignees, they would have taken it subject to all legal and equitable claims of others not in fraud of the rights of general creditors. They would be affected by all the equities which could be urged against him. Cook *vs.* Tullis, 18 Wall., 341. In Yeatman *vs.* Savings Inst., 95 U. S., 764, it was held to be an established

rule that, 'except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of the law or by act of the bankrupt, which existed against the property in the hand of the bankrupt.' 'He takes the property in the same plight and condition that the bankrupt held it.' Winsor *vs.* McLellan, 2 Story, 492. In Stewart *vs.* Platt, 101 U. S., 739, it was held that, although the chattel mortgages, involved in that litigation, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the parties. Mr. Justice Harlan, delivering the opinion of the court, said: 'The assignee took the property subject to such equities, liens, or incumbrances as would have affected it had no adjudication in bankruptcy been made. The latter (the assignee), representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert in behalf of the general creditors no claims to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee.'

"It follows that Bayer becoming a bankrupt while in possession of the skins purchased and in the tannery, under the contract of May 20th, 1874, if his assignee in bankruptcy had taken possession of them, he would have done so subject to the terms of that contract, and Hauselt would have had the right to require, either that he should perform the contract to its termination, so far as the skins then on hand were concerned, by finishing them and forwarding them

for sale, or that he should surrender possession to Hauselt, under some arrangement, mutually beneficial, whereby the enterprise might be wound up, under his management, such as that actually made by Bayer on November 6th, 1874, or if the assignee sold the property in the condition in which he received it, that he should account to Hauselt specifically for the proceeds of the sale, and recognize him as a creditor for the remainder of his advances not thereby refunded.

"Such being the mutual rights of the parties, the transaction of November 6th, 1874, though made with knowledge of Bayer's insolvency, and in contemplation of his bankruptcy, if made in good faith, as it is admitted to have been, for the purpose of securing to Hauselt the benefits of the contract of May 29th, 1874, was legitimate, and did not constitute, as was held by the Circuit Court, an unlawful preference in fraud of the bankrupt law."

We rely upon this opinion of this court as conclusive of the principles which determine the rights of the parties to this litigation.

That the principles thus expressed are not obsolete we would refer to their reaffirmation in South Branch Lumber Company *vs.* Ott, 142 U. S., 622.

In that case the insolvency law of the State of Iowa gave rise to the controversy, but the court sustained, as against the assignee for the benefit of creditors, the act of the insolvent debtor whereby a creditor was made secure in the enjoyment of property pursuant to an antecedent executory agreement.

Mr. Justice Brewer said:—

"In reference to the letter from Ott to White, with respect to holding the four carloads of glass as security for freights, it is clear that this was only putting in writing an agreement made long before. For the testimony of White and Ott both show, and to their testimony there is no contradiction, that White,

months before, had again and again urged prompt payment of freights, and that Ott had agreed to always leave on the track goods enough to secure any amount of freight that might be due. The prior agreement, though oral, was valid; and the letter was not a new contract, giving them a preference, but only a written expression of that which had heretofore been agreed upon, and agreed upon when there was no thought of an assignment. This brings the transaction within the reasoning of this court in the case of Hauselt *vs.* Harrison, 105 U. S., 401, in which, as against the claims of an assignee in bankruptcy, a transfer made immediately before the adjudication in bankruptcy was held to relate back and to carry into effect an agreement entered into long before, and therefore, not to be vitiated by the bankruptcy proceedings."

We would also refer to the learned opinion of Mr. Justice White in Walker *vs.* Brown, 165 U. S., 654, as showing the extent to which this court gives effect to executory agreements relating to chattels. In that case, successive decrees of a Circuit Court and a Circuit Court of Appeals were reversed, and an equitable lien was held to exist against certain bonds by virtue of a letter from the owner of the bonds to a creditor, stating that the bonds had been loaned to a debtor with the understanding that any indebtedess owing to the creditor at any time should be paid before the return of the bonds or their value to the owner, and that they or their value were at the risk of the debtor's business so far as any claim the creditor might have against the debtor was concerned.

The fact that the plaintiff in error is the trustee in bankruptcy of Bennett & Rothrock cannot enable him to strike down the rights of the defendant in error over the chattels in dispute secured to the defendant in error by the plainest kind of a contract.

In Cook *vs.* Tullis, 18 Wall., 341, a trustee in bank-

ruptcy sought to set aside the transfer of certain securities from the bankrupt to the defendant. It appeared that the bankrupt had been engaged in the business of banking and had received from the defendant bonds for safekeeping. The bankrupt, without the permission of the defendant, took and used certain of the bonds that had been left with him for safekeeping, substituting in their place the securities in suit. Shortly after the failure of the bankrupt, the defendant was informed of this substitution of securities and thereupon signified his acceptance of the same and his satisfaction with the transaction. It was held that the trustee in bankruptcy had no right to the securities given to the defendant in lieu of those which the bankrupt had used without authority.

In Yeatman *vs.* Savings Institution, 95 U. S., 764, the pledge of property in the due course of business and for a valuable consideration was held as against the trustee in bankruptcy of the pledgor, to entitle the pledgee to hold the property pledged until his debt had been paid.

In Stewart *vs.* Platt, 101 U. S., 731, certain chattel mortgages executed by a firm of bankrupts had not been properly recorded, and under the laws of New York were invalid as to creditors of subsequent purchasers or mortgagees in good faith. The trustee in bankruptcy, however, was held to have taken the property mortgaged subject to these mortgages for the reason that the mortgages were valid and effective as between the mortgagors and the mortgagee, and the trustee took no higher or better title than the mortgagors.

The three cases last referred to were decided under the Bankruptcy Act of 1867, but the plaintiff in error can derive no advantage from that fact.

By the Act of 1867, section 5046, is defined what property vested in the assignee:—

> "All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights, and copyrights; all debts due him, or

> any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal; and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together wth the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

This is fully as broad as the provision of section 70 of the Act of 1898, as to "property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied or sold under judicial process against him." The attempt to avoid the effect of our argument by suggesting that the Bankruptcy Act of 1898 enables the trustee in bankruptcy to avoid all transfers made in fraud of creditors, misses the whole point of our contention, which is that the transaction, as we consider it, was not in fraud of creditors, but one made in good faith, in which the defendant in error as a purchaser for value in the strict sense claims title to property in its possession, and for which it has paid full value.

In Chattanooga National Bank *vs.* Rome Iron Company 102 Fed. Rep., 755, it was held under the Bankruptcy Act of 1898 that any action taken, whereby immediately prior to bankruptcy a debtor made effective to his creditor a security which had been promised in the original contract, violated no right of the general creditors and the trustee in bankruptcy would not be permitted to assert any higher right than the debtor himself could have asserted if no bankruptcy had supervened.

The form of contract used by the parties in this case upon its face is styled "The Uniform Contract, adopted and recommended for general use by the American Institute of Architects and the National Association of Builders."

The fifth article appears not to have been original on this side of the Atlantic. Similar clauses have been in use in England for many years, and the cases in England under their Bankruptcy Act, in construing the rights of trustee in bankruptcy, fully sustain the position for which we contend.

In re Waugh, 4 Ch. Div., 524 (1876):—

> "A builder contracted with a building club to erect houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner, to the satisfaction of the architect of the club, or should become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements; provided that the contractor should have drawn money on account of his contract. The contractor commenced the works and carried them on for some time, receiving a considerable sum from the club. On the 2d of May he filed a liquidation petition. On the 2d of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they, on the expiration of two days, should employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works; and on the expiration of this notice the club took possession of the materials, implements and plant. It was held that the club was entitled, as against the trustees in

the liquidation, to retain what they had seized, the seizure being a protected transaction within the Bankruptcy Act."

In Hawthorne *vs.* Newcastle-upon-Tyne, &c., R. Co. 3, Q. B., 734:—

"A railway company entered into a contract (dated December 27th, 1836) with certain builders for building a bridge, all necessary implements and materials to be found by the builders with power to the company, if, in the opinion of the architect, the contractors should not proceed with sufficient expedition, to employ other or additional workmen, to complete the works, on giving them seven days' notice, and in such case to use the cranes, machines, implements and materials used on or about the works by the contractors, who were to defray the extra expenses incurred. The contract provided that the company should have a lien upon such machines, implements, and materials as should, for the time being, be in and upon the land, as a security for the completion of the bridge. On the 26th of July, 1837, the contractors committed an act of bankruptcy, and a fiat was issued on the 31st. Divers goods, timbers, &c., for building the bridge had been previously deposited by them on it and the land adjoining. These consisted of four kinds: First, Those actually on the land of the railway. Second. Those upon land adjoining the line (not the property of the company, but enclosed and taken possession of by them under the Act.) Third. Those deposited upon the lands of the temporary railway made by the bankrupts, over land not belonging to the company, for the convenience of conveying materials. Fourth. A crane erected by the contractors at the end of the temporary railway. On the 31st of July the company took possession of all these goods. On the 1st of August it gave the seven days' notice that other workmen would be employed and on the second

day they took upon themselves the completion of the bridge, using some of the goods and retaining the remainder. In trover brought by the assignees in bankruptcy for these goods it was held that the company had a lien upon the first and second classes, but not upon the third and fourth, which, nevertheless, at the expiration of the notice, it had a right to retain and use about the work, for the agreement was lawful, not being made in contemplation of bankruptcy, and that these rights of the company were not invalidated by the possession of the bankrupt, under 6 Geo. Iv. Ch. 16, 72, he being the true owner; nor by other implements and materials so used having been removed without any objection from the company's authority, the lien being a shifting one and attaching to such articles as were brought from time to time, and ceasing to such only as were removed; nor by the implements and materials not being scheduled.

Garrett *vs.* Salisbury Railway, Law Reps., 2 Equity, 358, illustrates the proposition which we have already developed, that clauses such as this in a building contract do not necessarily give an absolute ownership in the materials to the owner, but a qualified property right which will be enforced as far as is necessary for the protection of the owner, but on the terms which are equitable to the contractor and really in aid of his estate. The syllabus of the case is as follows:—

"An agreement between a railway company and a contractor provided that in case the contractor should be guilty of any delay or default in the fulfillment of the contract the company might take the execution of the work out of his hand, and might use all or any of his plant, materials, or implements; and that in addition to all other rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his con-

tract towards satisfaction of all losses or expenses occasioned to the company by the delay; and that all the materials, plant, and implements, which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company.

"The company took the execution out of the contractor's hands under this clause. The contractor brought an action for breach of contract, which with all matters in difference between the parties was referred to arbitration.

"*Held*, that the plant and materials did not become the absolute property of the company unless loss or expense had been occasioned to them; and an interlocutory injunction was awarded to restrain them from removing and selling the plant and materials pending the arbitration."

In Blake *vs.* Izard, 16 W. R., 108, a building contract provided that all materials brought on the land by the intended lessee should become the property of the land owners. The intended lessee entered and commenced building, but obtained no lease. It was held that the title to the materials brought on the land by him vested in the land owner and were not liable to be taken in execution by a creditor of the intended lessee.

In Brown *vs.* Bateman, 15 W. R., 350, by agreement between a land owner, A., and builder, B., B. undertook to build some houses on land belonging to A., B. to have the option of taking a lease, A. to make advances as the work progressed, and all bricks brought on premises for erection of houses to "be considered as immediately attached to and belonging to the said premises," no part to be removed without A.'s consent, and on failure of B. to proceed with erection, A. could re-enter and take possession of buildings and materials. The action was a suit

by a creditor of B. against the sheriff for failing to realize out of these materials levied on at the creditor's suit as belonging to B. Bovill, C. J., said, as the builder was in possession of the premises, "there had been no delivery of the materials to the landlord, and therefore the landlord possessed no rights except those mentioned in the agreement." After reading the clauses of the agreement, he said: "I think he had an equitable right when the materials were brought upon the premises; they became attached to and formed a part of the freehold, and therefor in my judgment an equitable interest was created and the materials ceased to be the property of the builder." The other judges agreed that by the contract an equitable interest in A., not coming within the Sales Act, had been created.

In Banbury & Cheltenham Direct Ry. Co. *vs.* Daniel, 33 W. R., 321, the contract between a railway company and a contractor for the construction of a new railway contained a provision that once a month during the construction of the railway the engineer of the company should certify the amount due and payable to contractor according to a scale to be agreed upon between the engineer and contractor, until a certain sum should have been certified, and that then the amounts certified for should be paid by the company within seven days after presentation of the certificates. It was held that the property in unused materials delivered by the contractor for the purpose of construction, which had been comprised in certificates of the engineer, but had not been paid for by the company, passed to the company, and an injunction was granted to restrain the contractor from removing such materials from the land of the company.

In *Ex parte* Newitt, L. R., 16 Ch., D. 522, a building agreement between a land owner and a builder, under which the builder became lessee, contained a stipulation that the land owner, upon the default of the builder, might re-enter and take possession of building, materials, &c., and it was held that the interest of the builder was defeasible, subject to the right of the owner; and that the

assignee in bankruptcy of the builder took subject to that right. In delivering his opinion, James, L. J., said: "The broad general principle is that a trustee in a bankruptcy takes all the bankrupt's property, but takes it subject to all the liabilities which affected it in the bankrupt's hands," and Cotton, L. J., said: "If, as is admitted, the rights of the land owner under the agreement could not have been defeated by a transfer of the chattels for value, so long as they remained on the land, by what provision of the Bankruptcy Act is the land owner placed in a worse position as against the trustee? None has been pointed out to us."

Tripp *vs.* Armitage, 4 Meeson & Welsby's Rep., 686, is sometimes referred to as sustaining a different principle, but it will be found upon an examination of the report that at the trial of the case Lord Abinger instructed the jury in accordance with the principle for which we contend, saying:—

> "If the advances were made to Bennett on the understanding and agreement that the materials brought upon the premises should be considered as a pledge for those advances, they should find a verdict for the defendants."

And the jury so found. Upon argument of a motion for a new trial, in an opinion which does not contravene the abstract proposition, he, upon investigation of the particular facts of that case, deemed it his duty to grant a new trial.

But even though the opinions of Lord Abinger and Baron Parke in the case last cited should be construed as sustaining the rule contended for by the other side, we respectfully submit that it is not in harmony with the line of English cases to which we are referring, and at all events it is not in accordance with the views expressed by this court.

Wood *vs.* Bell, 5 Ellis & Blackburn, 772, is an authority which in every way sustains our contention, and the opin-

ion of Lord Campbell, C. J., is in entire harmony with the ruling in the case of "The Poconoket," above cited. A statement of the syllabus shows everything which was decided:—

"J., a shipbuilder, agreed to build an iron steamship for W., on the same terms as other vessels which he had previously built for him. By reference to these terms it appeared that the price was to be £16,000, payable by installments, the first installment to be £1000, payable immediately. The second, third, and fourth, of £1000 each, to be payable at the end of two, three, and four months, respectively, from the date of the order; the remaining £12,000 to be payable by installments of £3000 each, the first £3000 at the end of six months, provided the vessel was plated and decks laid; the second £3000 at the end of eight months, provided the vessel was ready for trial; the third £3000 at the end of eleven months, provided the vessel was according to contract and perfectly completed; the last installment of £3000 at the end of thirteen months; the vessel to be built under the superintendence of H., appointed for that purpose by W., and according to his specifications.

"The building commenced under the superintendence of H. W. advanced the money to J. in anticipation of the installments. In the tenth month J. became bankrupt. The vessel was at that time unfinished in J.'s yard; the engines and part of the framework of the vessel, adapted for the unfinished ship, but not yet fixed into her framework, were there also. W. claimed the unfinished vessel and these engines and parts of the framework. The assignees of J. kept them as part of the estate of J. The amount paid in advance by W. exceeded the value of this property.

"A case was stated for the opinion of this court, setting forth the above facts, and also that the un-

finished ship was known at J.'s yard as W.'s ship, and that H. had, with J.'s consent, before the bankruptcy, stamped W.'s name on the keel of the vessel, for the express purpose of indicating that she was the property of W. The questions were, whether the property belonged to W. or the assignees; and whether W. could recover special damages for the detention of the ship, beyond its value.

"*Held*, that, whether the property in the unfinished ship was under the contract to vest as it was building, depended upon the intention of the contracting parties; that the provision making the payment of the installments partially dependent upon the progress of the ship was an indication of intention to vest the property as it was building; that the building of the vessel under the control of H., acting for W., was a stronger indication of intention; that these might not be sufficient by themselves; but that J., whilst *sui juris*, having consented to the stamping of the name of W. on the framework as declaring it his, the conclusion, from all the facts together, was that the property did vest. And that property in the loose engines and materials appropriated to the ship followed the ship itself.

"*Held*, also, that W. might recover special damage."

Ex parte Black, L. R., 26 Ch. Div., 510, is a further authority in our favor. If the facts which are stated in some confusion are carefully read, it will be seen that the vessel which was the subject of the contract in that case was under construction in the yard of the builder who became bankrupt. In so far as the owner of the vessel claimed a title in materials which had been specifically set apart for use in the ship, the court held that the owner had the right as against the trustee in bankruptcy.

We know that cases might be cited to sustain the proposition that a contract to build a house is an entire contract, and that until the entire house is constructed

the builder is not entitled to recover any portion of the price, and that if while under construction any portion is destroyed by fire or storm, the loss is the builder's. Such decisions do not contravene the proposition for which we contend. It may be that if a builder is to receive an entire compensation upon the completion of an entire work, no action can be maintained for that price except upon the completion of the entire work. But where the payment is by installments different consequences arise, and, as has already been point out in the "Poconoket" case, the question of when the title passes is to be determined as a fact in each case, depending upon the actual intent of the parties, to be determined by the contracts, both written and verbal.

But cases of the class above mentioned throw no light upon the legal relation of a party under a contract and circumstances such as are shown in this case.

When the application of a supposed principle of law in the construction of the rights of the parties under a contract produces a result which so intelligent a judge as Lord Abinger recognizes as a very hard case, it is not out of place to suggest the possibility that the principle has not so universal application as has been assumed.

It may well be that an abstract statement of principle which is deduced from decisions in suits by contractors to recover the contract price for work not finished according to contract, will cause confusion if used to enable a contractor to retake materials which he has delivered pursuant to contract and for which he has received full payment.

The case of the defendant in error may be summed up in the following propositions:—

1. The trustee in bankruptcy has no higher or better title than his assignors to maintain this action against this defendant in error.

2. As between the contracting parties, the defendant in error for whom the plaintiff's assignors contracted to erect the mill, had by the original contract an inchoate right and qualified title in the materials as soon as they were

placed upon the premises, which gave the defendant in error a *status* to object to any misappropriation of the same to any other use.

3. This inchoate right of the defendant in error was made firm by the subsequent oral agreement between the defendant in error and the contractors whereby, upon the faith of the materials delivered, the defendant in error made an advance of $15,000 in anticipation of the time prescribed by the contract.

4. As the assignors of the plaintiff in error obtained this advance payment in anticipation of the complete doing of the work which would have entitled them to demand payment under the contract, it does not now lie in their mouth, or in the mouth of their trustee, to dispute the title of the defendant in error, which they admit would have been indisputable had the work of completely affixing the materials been performed.

WM. JAY TURNER,
RICHARD C. DALE,
For Defendant in Error.

Supreme Court of the United States.

No. 83.—October Term, 1903

W. H. Spencer, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett and Rothrock, Plaintiff in Error,
vs.
Duplan Silk Company.

In error to the United States Circuit Court of Appeals for the Third Circuit.

[December 21, 1903.]

This was an action of trover commenced by plaintiff in error in the Court of Common Pleas for the county of Lehigh, Pennsylvania, October 18, 1900, the declaration averring in substance that on January 13, 1900, certain lumber and building materials were the property of the firm of Bennett & Rothrock, and that by virtue of an adjudication in bankruptcy of that date plaintiff succeeded to the title of that firm to said lumber and materials, and that on January 15, 1900, defendant in error wrongfully converted the lumber and materials to its own use.

November 19, 1900, defendant in error presented its bond and petition for the removal of the cause to the Circuit Court of the United States for the Eastern District of Pennsylvania, the petition alleging that the controversy in the suit was wholly between citizens of different States; that the plaintiff, trustee in bankruptcy of Bennett and Rothrock, and Bennett and Rothrock themselves, were at the time of the commencement of the suit, and at the time the petition for removal was presented, citizens of the State of Pennsylvania; and that the defendant was at the time of the commencement of the suit, and at the time the petition for removal was presented, a citizen of New York; and thereupon the cause was removed. The cause having been docketed and the record filed, defendant filed a plea of not guilty, and a trial was had November 11, 1901, resulting in a verdict for plaintiff for $12,183. January 15, 1902, a motion by defendant for judgment *non obstante veredicto* was overruled and judgment entered in favor of plaintiff, 112 Fed. Rep. 638, to review which defendant prosecuted a writ of error from the United States Circuit Court of Appeals for the Third Circuit, and that court on May 7, 1902, rendered a judgment in the cause reversing the judgment of the Circuit Court and remanding the cause with instructions to enter judgment for

defendant on the verdict. 115 Fed. Rep. 689. This writ of error was then allowed.

Mr. Chief Justice FULLER delivered the opinion of the Court:

In our opinion the jurisdiction of the Circuit Court depended entirely on diverse citizenship, the judgment of the Circuit Court of Appeals was final, and the writ of error must be dismissed. *Colorado Central Consolidated Mining Company* v. *Turck*, 150 U. S. 138; *Borgmeyer, Admr.*, v. *Idler*, 159 U. S. 408; *Press Publishing Company* v. *Monroe*, 164 U. S. 105.

The views expressed in the latter case will suffice to indicate the governing rules. In that case the complaint in the Circuit Court showed that the parties were citizens of different States, and did not claim under the Constitution or laws of the United States. At the trial plaintiff relied wholly upon a common-law right, but defendant invoked the Constitution and laws of the United States. Judgment having passed for plaintiff, which was affirmed by the Circuit Court of Appeals, we dismissed a writ of error to that court on the ground that its judgment was made final by the statute. Mr. Justice Gray, delivering the opinion, said:

"Of suits of a civil nature, at law or in equity, the Circuit Courts of the United States have original jurisdiction, by reason of the citizenship of the parties, in cases between citizens of different States or between citizens of a State and aliens; and by reason of the cause of action, 'in cases arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority,' including, of course, suits arising under the patent or copyright laws of the United States. Act of August 13, 1888, chapter 866, § 1; (25 Stat. at L. 433;) Rev. Stat. § 629, clause 9. In order to give the Circuit Court jurisdiction of a case as one arising under the Constitution, laws or treaties of the United States, that it does so arise must appear from the plaintiff's own statement of his claim. *Colorado Company* v. *Turck*, 150 U. S. 138; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Oregon &c. Railway* v. *Skottowe*, 162 U. S. 490; *Hanford* v. *Davies*, 163 U. S. 273.

"From final judgments of the Circuit Court in civil suits an appeal or writ of error lies to this court, or to the Circuit Court of Appeals. It lies directly to this court in any case in which the jurisdiction of the Circuit Court is in issue; and in such case the question of jurisdiction only is certified to and decided by this court. It also lies directly from the Circuit Court to this court in cases involving the construction or application of the Constitution, or the constitutionality of a law, or the validity or construction of a treaty, of the United States, or in which the Constitution or a law of a State is claimed to be in contravention of the Constitution of the United States; and in any of these cases the appellate jurisdiction of this court is not limited to the constitutional question, but extends to the determination of the whole case. Act of March 3, 1891, chapter 517, section 5; (26 Stat. at L. 827, 828;) *Horner* v. *United States*, 143 U. S. 570; *Chappell* v. *United States*, 160 U. S. 499.

"From final judgments of the Circuit Court in all other civil suits an appeal or writ of error lies to the Circuit Court of Appeals; and the judgments rendered thereon by the Circuit Court of Appeals are final (unless this court by writ of certiorari or otherwise, orders the whole case to be brought up for its decision) in all cases in which the jurisdiction of the Circuit Court 'is dependent entirely upon the parties being aliens and citizens of the United States, or citizens of different States;' as well as in cases arising under the patent laws, or under the revenue laws. In all other civil actions (including those arising under the copyright laws of the United States,) if the matter in controversy exceeds $1,000, besides costs, there is, as of right, an appeal or writ of error to bring the case to this court. Act of March 3, 1891, chapter 517, section 6.

"This plaintiff in error, having been defeated in the Circuit Court, did not bring the case directly to this court, as one involving the construction or application of the Constitution of the United States, or upon any other of the grounds specified in section 5 of the act of 1891. But it took the case, under section 6, to the Circuit Court of Appeals, and having been again defeated in that court, now claims, as of right, a review by this court of the judgment of the Circuit Court of Appeals.

"The judgment of the Circuit Court of Appeals being made final in all cases in which the jurisdiction of the Circuit Court is dependent entirely upon the parties being citizens of different States, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds $1,000, the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United States, or was one in which the jurisdiction of the Circuit Court wholly depended upon the parties being citizens of different States.

"The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2,000, showed that the Circuit Court had jurisdiction of the case by reason of the parties being citizens of different States. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to that Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Co.* v. *Turck*, above cited, is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals.

"The jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different States, the judgment of the Circuit Court of Appeals was final, and the writ of error must be dismissed for want of jurisdiction."

In the present case it is contended that the jurisdiction was not dependent entirely on the opposite parties to the suit being citizens of different States, because the suit arose under the laws of the United States, and that therefore jurisdiction rested also on that ground. But a suit does not so arise

unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by plaintiff's pleading. *Arbuckle* v. *Blackburn, ante,* p. ; *Western Union Telegraph Co.* v. *Ann Arbor Railroad Company,* 178 U. S. 239; *Muse* v. *Arlington Hotel Company,* 168 U. S. 430.

Plaintiff's declaration set forth no matter raising any controversy under the Constitution, laws or treaties of the United States. It is true that if the lumber and materials belonged to Bennett and Rothrock on January 13, 1900, plaintiff in error succeeded to the title of the firm on the adjudication, but the question of Bennett and Rothrock's ownership on that day in itself involved no Federal controversy, and the mere fact that plaintiff was trustee in bankruptcy did not give jurisdiction. *Bardes* v. *Bank,* 178 U. S. 524. Indeed if the case had not been removed and had gone to judgment in the Court of Common Pleas, and that judgment had been affirmed by the Supreme Court of Pennsylvania on the same grounds as those on which the Circuit Court of Appeals proceeded, a writ of error could not have been brought under section 709 of the Revised Statutes, for the case would not have fallen within either of the classes enumerated in that section as the basis of our jurisdiction. The validity of the bankruptcy act was conceded, and no right specially set up or claimed under it was denied.

Section 23 of the bankruptcy law does not enable us to maintain jurisdiction. The first two clauses read (before the amendment of February 5, 1903) as follows:

"SEC. 23*a*. The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"*b*. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Plaintiff brought his action in the State court, and its removal on the ground of diverse citizenship placed it in the Circuit Court as if it had been commenced there on that ground of jurisdiction, and not as if it had been commenced there by consent of defendant under section 23 of the bankruptcy act. The right to removal is absolute and cannot be trammeled by such a consequence.

Nor can this writ of error be sustained under section 25 of the bankruptcy law, for the section has no application. The reasons for that conclusion will be found in *Holden* v. *Stratton, ante,* p .

As to the suggestion that certiorari might now be issued, the judgment of the Circuit Court of Appeals was rendered May 7, 1902, and there is nothing to take the case out of the general rule. *The Conqueror,* 166 U. S. 110, 114; *Ayres* v. *Polsdorfer,* 187 U. S. 585, 595.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.